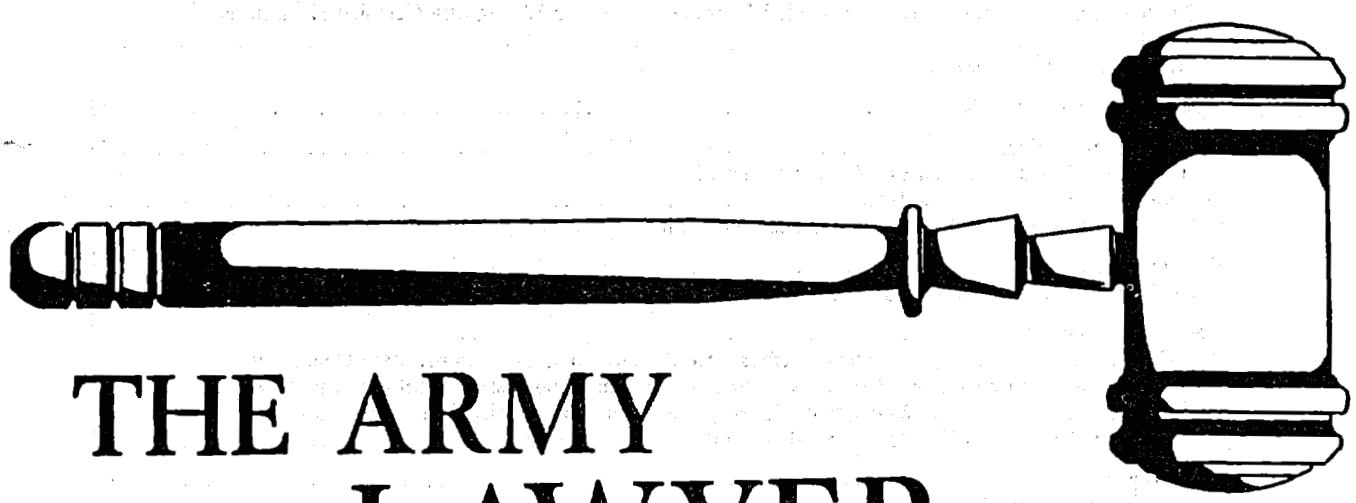

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27–50–170

February 1987

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The Army Lawyer (ISSN 0364–1287)

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The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as The Army Lawyer, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903–1781.

Recent Developments in Contract Law—1986 in Review

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Introduction

In 1986, Congress once again had a significant impact on the way we do business, imposing more legislative controls on and enacting further changes to the federal procurement system. Fraud abatement efforts continued to be a hot topic, with several important statutes being passed in the waning days of the 99th Congress. There were also significant jurisdictional and substantive developments in the various forums in which we practice, and new regulations were created to implement the changes, although not as quickly as they have occurred. The field of government contract law remains dynamic, which allows us to discuss a wide range of topics in this article in an attempt to keep our contract attorneys in the field updated.

The items discussed in this article have been selected for their general interest and significance or because they affect the contracting process and the contract attorney. The discussion of these items is not intended to be exhaustive, but rather is intended to inform you generally of the developments in government contract law in 1986.

Protests

The Comptroller General

Constitutionality of GAO Protest Authority

Seemingly the most significant decision concerning the Comptroller General during 1986 was the holding by the Court of Appeals for the Third Circuit in *Ameron, Inc. v. U.S. Army Corps of Engineers*[1] that the provisions of the Competition in Contracting Act of 1984[2] providing for a stay of a contract award pending resolution of a protest to the General Accounting Office (GAO) are constitutional. The government had argued that to allow the Comptroller General, a part of the legislative branch, to direct executive branch procurements was in violation of the separation of powers doctrine. The Third Circuit rejected the argument. In response to this decision, and while not conceding the issue totally, the executive implemented the disputed CICA stay provisions in the Federal Acquisition Regulation,[3] and the issue seemed to be dead.

The Supreme Court, however, heard another case challenging the Comptroller General's role, this time with respect to the Balanced Budget and Emergency Deficit Control Act of 1985,[4] more commonly known as the Gramm-Rudman-Hollings Act. The challenge in *Bowsher v. Synar*[5] was again based upon the separation of powers doctrine. The Court found that assigning executive powers to the Comptroller General, an officer removable only by Congress, violated the separation of powers doctrine. The Court therefore declared these provisions of the Act unconstitutional.

This decision raised new doubts as to the constitutionality of the Comptroller General's bid protest responsibilities. The Department of Justice (DOJ) returned to the Third Circuit and asked it to reconsider its *Ameron* holding. DOJ argued that *Synar* left little doubt that the Comptroller General should be considered under legislative branch control. The Third Circuit, however, determined that the Comptroller General's function under CICA of reviewing bid protests and granting stays is a minimal intrusion into executive branch functions and affirmed its earlier decision.[6]

The Form of the Protest

CICA defines a protest as a written objection to a solicitation, proposed award, or award of a contract. The Comptroller General has determined that oral protests, even to an agency, are no longer provided for under the FAR. Accordingly, an oral complaint to an agency prior to bid opening of an impropriety apparent on the face of the solicitation will not save a protester who did not complain to GAO until after bid opening. In *K–II Construction, Inc.*,[7] GAO held the oral complaint not to be a "protest" and dismissed for failure to file a timely protest.

Interested Parties

GAO has narrowly interpreted the new "interested party" definition. CICA empowers GAO to hear protests from an "interested party," which is defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."[8]

Not in line for award. In *Eastman Kodak Company*[9] and *Eason & Smith Enterprises, Inc.*,[10] the Comptroller General ruled that third-low offerors were not "interested parties"

*This article was originally prepared for and presented to the 1987 Government Contract Law Symposium at the U.S. Army Judge Advocate General's School held 12–16 January 1987.

[1] 787 F.2d 875 (3rd Cir. 1986).

[2] Pub. L. No. 98–369, 89 Stat. 1199, 31 U.S.C. § 3551 (Supp. III 1985) [hereinafter CICA].

[3] Federal Acquisition Regulation (1 Apr. 1984) [hereinafter FAR].

[4] Pub. L. No. 99–177, 99 Stat. 1028, 2 U.S.C. §§ 901–922 (Supp. III 1985).

[5] 106 S. Ct. 3181 (1986).

[6] Ameron, Inc. v. Army Corps of Engineers, 787 F.2d 875 (3d. Cir. 1986) *aff'd on reconsideration*, Nos. 85–5226 & 85–5377 (3rd Cir. Dec. 31, 1986).

[7] Comp. Gen. Dec. B–221661 (Mar. 18, 1986), 86–1 CPD ¶ 270.

[8] 31 U.S.C. § 3551(2) (Supp. III 1985), *as implemented in* the Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1985).

[9] Comp. Gen. Dec. B–220646 (Jan. 31, 1986), 86–1 CPD ¶ 113.

[10] Comp. Gen. Dec. B–222279.2 (Apr. 18, 1986), 86–1 CPD ¶ 386.

under CICA. The Comptroller General reasoned that because a third-low offeror does not have a direct economic interest in the award of a contract, it does not have standing under CICA to protest an award of the contract to the first-low bidder.

Subcontractors. In *PolyCon Corporation,*[11] the GAO first addressed the protest status of subcontractors under CICA. The Comptroller General rejected PolyCon's protest because a potential subcontractor was not an "actual or prospective bidder of offeror." It noted that this decision departed from previous GAO holdings that allowed subcontractors standing when they could show that their interests could not be otherwise protected outside the protest forum. Some subcontractor protests may still be heard, however, where the subcontract is by or for the federal government.[12] GAO reiterated this view in *Analytics Communications Systems.*[13]

Potential suppliers of goods to the bidders. In *ADB–ALNACO, Inc.,*[14] the Comptroller General rejected the protest of a manufacturer that supplied equipment to potential bidders or offerors because suppliers to potential bidders do not fall within the definition of an "interested party" under the Bid Protest Regulations. A potential supplier is not a bidder and does not have any direct interests in the award of the contract.

Trade associations and unions. Trade associations and unions have also been denied standing under the new definition of "interested party." In *Northwest Forest Workers Association; Second Growth Forest Management, Inc.,*[15] the Comptroller General denied the protest of a trade association, finding that the association did not itself bid upon government contracts and therefore was not an actual or prospective bidder.

In *National Federation of Federal Employees Local 2049,*[16] the Comptroller General found that a union local representing federal employees was not an actual or prospective bidder.

Debarment. The GAO held in *Sentex Industrial Corp.*[17] that a firm subject to an ongoing debarment proceeding was precluded from receiving any government contract awards pending the outcome of those proceedings. Therefore, the protesting party had no legitimate interest in the matter and was not eligible for award even if the protest were sustained.

Offerors of nonconforming goods. In *Endure-A-Lifetime Products, Inc.,*[18] the protest by an offeror of a nonconforming product was denied. The Comptroller General found that the protestor was not an interested party because the offeror of a nonconforming product was not an "actual offeror" under CICA.

Late bidder. In *Nuaire, Inc.,*[19] the Comptroller General rejected the protest because the protestor's offer was late; because it had not made an actual offer, the protestor had no standing to protest the award under CICA.

Outside geographic area. In *Pacific Sky Supply, Inc.,*[20] a protestor who could not comply with the geographic restrictions of the solicitation did not have standing to oppose various provisions of the solicitation. After the Comptroller General concluded that the geographic restrictions were valid, he had to dismiss the protest because Pacific Sky was not an actual or prospective offeror.

Non-offeror. In *Tumpane Services Corp.,*[21] the Comptroller General held that a prospective offeror that did not submit a proposal could still be an interested party. Tumpane asserted that certain state leasehold taxes rendered the preparation of price proposals impossible and therefore it did not submit an offer. Because Tumpane could not prepare its price proposal, it argued that others could not do so either and protested the award of the contract as improper. The Comptroller General held that the failure to submit an offer did not automatically disqualify the protestor as an "interested party." Instead, he found that Tumpane's interest as a potential competitor, if the protest were successful, was sufficient to make it an interested party under CICA.

"Subject Matter" Jurisdiction

Federal agency. 31 U.S.C. § 3551(1) (Supp. II 1984) defines a "protest" as an objection by an interested party to a solicitation by a federal agency for bids or proposals or the proposed award of a contract. The Department of State argued that it was exempt from the FAR for the procurement of supplies for an embassy[22] and, therefore, GAO had no jurisdiction to hear a protest of the acquisition. In *Flexsteel Industries, Inc.,*[23] however, the GAO held that its authority under CICA—to consider bid protests of procurements by "federal agencies"—is not affected by the extent to which an agency is covered by the cited law and regulation.

Appropriated Funds. Merely using appropriated funds for an acquisition will not necessarily confer jurisdiction. In

[11] 64 Comp. Gen. 523, Comp. Gen. Dec. B–218304, B–218305 (May 17, 1985), 85–1 CPD ¶ 567.

[12] *See* 4 C.F.R. § 21.3(f)(10) (1985).

[13] Comp. Gen. Dec. B–222402 (Apr. 10, 1986), 86–1 CPD ¶ 356.

[14] 64 Comp. Gen. 577, Comp. Gen. Dec. B–218541 (Jun. 3, 1985), 85–1 CPD ¶ 633.

[15] Comp. Gen. Dec. B–218097 (Jun. 3, 1985), 85–1 CPD ¶ 628.

[16] Comp. Gen Dec. B–220838 (Oct. 23, 1985), 85–2 CPD ¶ 454.

[17] Comp. Gen. Dec. B–221753 (Apr. 15, 1986), 86–1 CPD ¶ 367.

[18] Comp. Gen. Dec. B–219529.2 (Oct. 11, 1985), 85–2 CPD ¶ 404.

[19] Comp. Gen. Dec B–221551 (Apr. 2, 1986), 86–1 CPD ¶ 314.

[20] Comp. Gen. Dec. B–221375 (Apr. 3, 1986), 86–1 CPD ¶ 320.

[21] Comp. Gen. Dec. B–220465 (Jan. 28, 1986), 86–1 CPD ¶ 95.

[22] *See* 40 U.S.C. § 474(7) (1982).

[23] Comp. Gen. Dec. B–221192 (Apr. 7, 1986), 86–1 CPD ¶ 337.

Environmental Tectonics Corp.,[24] the GAO found no authority to consider a protest against an acquisition by the Government of Egypt, even though funded by a loan from appropriated funds, because a foreign country is not a "federal agency."

Nonappropriated fund protests. On the other hand, GAO also held that the fact that appropriated funds are *not* being used for an acquisition will not necessarily deny GAO jurisdiction. The General Accounting Office will consider certain protests involving procurements for nonappropriated fund activities. In *Artisan Builders*,[25] the Comptroller General stated that his office has jurisdiction under CICA to decide bid protests concerning alleged violations of procurement statutes and regulations where a federal agency conducts the procurement on behalf of the nonappropriated fund activity.

Prior to the Competition in Contracting Act of 1984, the Comptroller General's jurisdiction over protests was based on his authority to adjust and settle appropriated accounts pursuant to 31 U.S.C. § 3526 (1982). Under this authority, GAO could not review protests involving exclusively nonappropriated funds.

The Comptroller General determined that he had jurisdiction in *Artisan Builders* because, although GAO will not consider protests of procurements *by* nonappropriated fund activities,[26] this procurement was conducted by the agency (the Air Force) on behalf of the nonappropriated fund activity and the protest alleged violations of procurement statutes and regulations.

Filing Requirements

Several recent decisions of the GAO have discussed the requirement that the protestor provide a copy of the protest to the contracting agency not later than one day after filing with the GAO. This rule[27] is designed to assure that agencies know of protests promptly, so they can meet their twenty-five day statutory deadline for filing agency reports with GAO. The Comptroller General has refused to dismiss protests for the protestor's failure to comply with this rule, however, where the facts indicate that the agency had actual knowledge of the protest and timely filed its report.

On the other hand, where the agency had no knowledge of the protest, did not receive the required notice, and thus did not timely file its report, the GAO dismissed the protest even though the protestor alleged that he did dispatch a copy of the protest to the agency. GAO took the position in *Federal Contracting Corp.*[28] that it is the protestor's responsibility to ensure that a copy is *received* by the agency.

General Services Administration Board of Contract Appeals (GSBCA)

Jurisdiction

CICA conferred jurisdiction upon the GSBCA in the protest arena over automatic data processing equipment (ADPE) acquisitions conducted under the Brooks Act.[29]

Case developments. In *Amdahl Corp.*,[30] the board considered its jurisdiction and determined that it was coextensive with GSA's exclusive procurement authority under the Brooks Act. In later explaining this decision, the board stated: "By seeking the delegation of procurement authority, the procuring agency explicitly acknowledged that a Brooks Act procurement was involved and proceeded to conduct the procurement under that authority."[31] But what if the agency should have sought a delegation and did not? Several new cases and statutes this year have addressed the scope of the board's jurisdiction in this situation.

In *Xerox Corp.*,[32] the GSBCA decided that it had jurisdiction under CICA and could suspend a contract based upon acquisitions which the board determined to be subject to the Brooks Act, even if the particular procurement was not conducted under that authority. In the instant acquisition, the Government Printing Office determined that the purchase was not subject to the Brooks Act and accordingly did not seek a delegation of procurement authority. The GSBCA heard the case anyway.

In *Electronics Data Systems Federal Corp. v. General Services Administration*,[33] the United States Court of Appeals for the Federal Circuit disagreed with the GSBCA's determination in *Xerox*. The court held that the GSBCA lacked jurisdiction over an acquisition not conducted under the Brooks Act and for which a delegation of procurement authority was not sought by the agency. Furthermore, the GSBCA has no authority to decide if a procurement *should* have been conducted under the Act. In the instant case, the procuring agency had determined that the acquisition was not covered by the Brooks Act. GSA disagreed. The agency had then asked the Office of Management and Budget (OMB) for an opinion and OMB sided with the agency. The court determined OMB to be the final arbiter of the applicability of the Act and determined that the GSBCA had no authority to override OMB's decision.

Shortly after the *EDS* decision was handed down, the GSBCA held in *AMTEC Information Services, Inc.*,[34] that it had jurisdiction over an acquisition in which there was a blanket delegation of procurement authority (DPA), even though the agency did not use the DPA in conducting the

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[24] Comp. Gen. Dec. B-222483 (Apr. 16, 1986), 86-1 CPD ¶ 377.

[25] Comp. Gen. Dec. B-220804 (Jan. 24, 1986), 86-1 CPD ¶ 85.

[26] 4 C.F.R. § 21.3(f)(8) (1985).

[27] 4 C.F.R. § 21.1(d) (1985).

[28] Comp. Gen. Dec. B-224064 (Oct. 10, 1986), 86-2 CPD ¶ 420.

[29] 40 U.S.C. § 759 (1982).

[30] GSBCA No. 7859-P, 85-2 B.C.A. (CCH) ¶ 18,111.

[31] AMTEC Information Services, Inc., 86-3 B.C.A. (CCH) ¶ 19,021, at 96,069.

[32] GSBCA No. 8333-P, 86-1 B.C.A. (CCH) ¶ 18,726.

[33] 792 F.2d 1569 (1986).

[34] GSBCA No. 8465-P, 86-3 B.C.A. (CCH) ¶ 19,020.

procurement. The GSBCA, however, referring to *EDS*, vacated the *AMTEC* decision. The GSBCA held that because the procuring agency had neither sought nor obtained approval for a Brooks Act acquisition, and because the Act was not cited in the solicitation, there was no GSBCA jurisdiction.[35]

Omnibus Appropriations Act. CICA set up a three-year test program authorizing the GSBCA to hear protests. The Omnibus Appropriations Act.,[36] made that jurisdiction permanent.[37]

Congress also noted the confusion as to the scope of the GSBCA's jurisdiction and attempted to resolve the issue by amendments to the Brooks Act. Congress stated in the Conference Report that in *EDS* the Court of Appeals for the Federal Circuit misinterpreted CICA to provide jurisdiction to the GSBCA only over procurements actually conducted under the Act, and not those that should have been but were not. "In essence, the Federal Circuit has removed from the Board's jurisdiction those instances where an agency ignores, or fails to act in accordance with, the tenets of the statute."[38] In the Omnibus Appropriations Act, Congress stated its intention to eliminate the misunderstandings created by *EDS*, and amended the Brooks Act to provide the GSBCA with authority to hear protests "*in connection with* any procurement which is subject to" the Act.[39] The board was also granted authority over procurements "*subject to* delegation," not merely those "conducted under delegations."[40]

Resolving the question as to what authority the GSBCA has to determine its own jurisdiction, the statute also provides that the board's authority includes the "authority to determine *whether* any procurement is subject to" the Act.[41] While the GSBCA may consider the decisions of OMB or any other agency as to the applicability of the Brooks Act, it "shall not be bound by any such decision."[42]

The statute also broadened the definition of ADPE to include any equipment or interconnected system or subsystem of equipment to include support services.

GSBCA Cases

No injury to protestor. The GSBCA has decided a case in which the protestor suffered no injury. In *Sperry Corp., Sysorex Information Systems, Inc., and M/A-Com Information Systems, Inc.*,[43] the GSBCA declared that it has jurisdiction to determine whether an agency has violated a statute or regulation or has exceeded its delegation of procurement authority. It is not necessary for the protestor to demonstrate that it suffered any injury as a result of the agency's impropriety. The board decided that the protestor may be entitled to attorney's fees and costs as a remedy even though his particular proposal could not be legally accepted even if the challenged acquisition had been conducted properly.

Attorney's fees and proposal costs. Another area for consideration before the GSBCA in 1986 was that of attorney's fees and proposal costs. In the past, fees and costs have not generally been awarded where the protestor received other effective relief.

In *NCR Comten, Inc.*,[44] however, the GSBCA awarded fees and costs to a protestor even though it also granted the requested relief (cancellation of a solicitation). The board read CICA as not limiting recovery to only those cases in which there was no effective relief.

In *Computer Lines*,[45] the GSBCA refused to award attorney's fees to a prevailing party that appeared *pro se*.

The GSBCA also refused to award fees and costs to the successful awardee that intervened in a protest by its competitor in *Commercial Data Center, Inc.*,[46] The contractor's (intervenor's) dispute was with its competitor. Fees and costs may be awarded only for successful disputes with the government.

In *Computer Marketing Association*,[47] the GSBCA awarded attorney's fees. The board determined, however, that award of proposal costs was a separate issue. CICA authorizes the GSBCA to award attorney's fees. It does not give the board jurisdiction to award damages in the form of proposal costs based upon breach of the implied contract to evaluate bids fairly.

Claims Court

Protest of a non-bidder

In *Omega World Travel, Inc., v. United States*,[48] the protester sought an injunction to require agencies to use competitive procedures. No solicitation had been issued. The Claims Court found that a "contract claim" under 28 U.S.C. § 1491 (1982), here an implied-in-fact contract that the government will consider bids fairly, is an "indispensable predicate" for the court's jurisdiction. Because the

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[35] AMTEC Information Services, Inc., GSBCA No. 8465-P, 86-3 B.C.A. (CCH) ¶ 19,021 vacating 86-3 B.C.A. (CCH) ¶ 19,020, *motion or recon.* denied, 86-3 B.C.A. (CCH) ¶ 19,270.

[36] H.J. Res. 738, Pub. L. No. 99-591, 100 Stat. ___ (1986) [hereinafter H.J. Res. 738].

[37] *Id.* § 824.

[38] Conference Report to H.J. Res. 738, *reprinted in* Fed. Cont. Rep. [BNA] No. 46 at 757, 759 (Oct. 27, 1986).

[39] H.J. Res. 738, *supra* note 36, § 824(1) (emphasis added).

[40] *Id.* § 824(2) (emphasis added).

[41] *Id.* § 824(3) (emphasis added).

[42] *Id.* § 824(4).

[43] GSBCA No. 8208-P-R, 86-2 B.C.A. (CCH) ¶ 18,821.

[44] GSBCA No. 8229, 86-2 B.C.A. (CCH) ¶ 18,822.

[45] GSBCA No. 8334-C (9 Oct. 1986).

[46] GSBCA No. 8496-C, 86-3 B.C.A. (CCH) ¶ 19,129.

[47] GSBCA No. 8276-C (6 Oct. 1986).

[48] 9 Cl. Ct. 623 (1986).

protestor was not a bidder, and in fact there was no solicitation, there was no contract, no claim, and, therefore, no jurisdiction.

Ineligibility for award

The Claims Court's equitable jurisdiction does not allow for challenges of ineligibility for the contract. In *Sterlingwear of Boston, Inc. v. United States,*[49] there was no evidence that the government had breached its implied-in-fact contract to fairly consider the protestor's bid. The agency had determined the protestor to be ineligible for award because of a pending debarment action and Sterlingwear protested. The court determined that it had no jurisdiction for this part of the challenge.

Must have substantial chance of receiving award

The Claims Court decided that an offeror lacks standing to protest unless it has a "substantial chance" of receiving the award. This does not necessarily mean that the protestor must show that it would get the contract, but it must have a substantial chance in order to have the required "actual or threatened injury" to support standing. Accordingly, in *Caddell Constr. Co. v. United States,*[50] the court held that an offeror who was fourth in line lacked standing.

Litigation

Jurisdiction

Certification

In a case decided on reconsideration, the Armed Services Board of Contract Appeals (ASBCA) has ruled in *Henry Shirek*[51] that a certification of a claim under the Contract Disputes Act[52] was not defective if it was supported by a separate letter identifying the exact amount of the claim. The contractor's certification, which was otherwise in proper form, referenced an accompanying letter prepared by counsel indicating the exact amount of the claim. The board found no support for the government's argument that the sum certain had to be included in the certified document and that no reference to another document could be made.

Timeliness

The United States Claims Court ruled in *Pathman Construction Co. v. United States*[53] that a contractor's suit filed more than one year after its claim was deemed denied by the contracting officer's failure to issue a final decision was untimely. The court held that the contractor was obligated to move ahead by timely suit or appeal to the appropriate contract appeals board to set a date for a final decision. In this case, the contractor had neither gone to an appeals board to force a decision from the contracting officer nor filed suit in the Claims Court. For a number of years, the contractor had just requested a final decision from the contracting officer without result. The court held that the Contract Disputes Act states that a failure by the contracting officer to issue a decision on a claim within sixty days will be treated as a decision denying the claim.[54] At that point, the contractor can either file an appeal at the appropriate board of contract appeals or file suit in the Claims Court. The Contract Disputes Act states that these actions must be accomplished within twelve months of the receipt of the contracting officer's final decision. Here, the final decision was deemed issued by operation of law and the contractor had waited longer than the twelve months to file suit. The *Pathman* court found that Congress did not intend to allow contractors an unlimited period in which to file suit when a contracting officer fails to issue a final decision.

The decision in this case is contrary to others issued by the same court. In *Vemo Co. v. United States*[55] and *G&H Machinery Co. v. United States,*[56] two other judges of the Claims Court had held that the statute did not require the limitations period to start automatically, but rather only upon receipt of the contracting officer's final decision. The limitations period was not triggered by the failure to issue a final decision within sixty days after written demand. The court in *Pathman*, however, said that these decisions ignore the limited waiver of sovereign immunity in the Contract Disputes Act.

The contractor in *Pathman* has appealed the Claims Court's ruling to the Court of Appeals for the Federal Circuit.[57] Pathman's and amicus arguments center around the point that a contractor is not required to appeal a contracting officer's final decision until receipt of a written copy of the decision, and that a ruling otherwise would be contrary to the intent of the Contract Disputes Act to minimize litigation and encourage settlements.[58]

Terminations

Last year the Claims Court, in *Berna Gunn-Williams v. United States,*[59] held that a termination for default is not a dispute over which the court has jurisdiction absent a money claim (*e.g.*, a claim for termination for convenience costs

[49] 10 Cl. Ct. 644 (1986).

[50] 9 Cl. Ct. 610 (1986).

[51] ASBCA No. 28414 (27 Aug. 1986).

[52] 41 U.S.C. §§ 601–618 (1982).

[53] 10 Cl. Ct. 142 (1986).

[54] 41 U.S.C. § 605(c) (1982).

[55] 9 Cl. Ct. 217 (1985).

[56] 7 Cl. Ct. 199 (1985).

[57] Pathman Constr. Co. v. United States, No. 86–1537 (Fed. Cir. Sept. 26, 1986).

[58] Fed. Cont. Rep. (BNA) No. 46, at 873 (Nov. 17, 1986). For an interesting and timely analysis of this decision and its potential ramifications (such as encouraging contracting officers to avoid issuing final decisions), see Kienlen, Pathman-*Jurisdictional Oddity,* The Army Lawyer, Nov. 1986, at 63.

[59] 6 Cl. Ct. 820 (1985).

or a claim challenging an assessment of excess reprocurement costs). In *Almeda Industries, Inc.*,[60] the Engineer Board disagreed with the Claims Court's position and held that a default termination is a government claim from which a contractor can appeal without certifying the amount of the claim. The same is apparently not true with respect to a termination for convenience, however. According to the ASBCA, such a termination is not an appealable contracting officer's final decision.[61]

Declaratory Relief

A split of authority has developed between the various boards and the United States Claims Court regarding the authority of the forums to grant declaratory relief.[62] The Court of Appeals for the Federal Circuit has now entered the arena, but its rulings have not resolved the issue.

In *Seneca Timber Co.*,[63] the Agriculture Board held that a contractor's request for a prospective rate redetermination and a contract term adjustment under a contract clause that allowed such modifications (if road construction was not complete on a specified date) was in fact a request for a declaratory judgment. The board held further that it had no jurisdiction to grant such relief. On appeal to the Federal Circuit, the court, in a brief three paragraph opinion, affirmed the board's decision. The court also stated that its decision would not be published and may not be cited as precedent.[64]

In *Cedar Lumber, Inc.*,[65] the Agriculture Board held that the contractor was seeking a declaratory judgment in requesting that its right to a rate redetermination be decided prospective to contract performance. On appeal to the Federal Circuit, the court held that the board erred in ruling that it lacked jurisdiction. The court stated that determining the right to a rate redetermination was not tantamount to declaratory relief because the contract provided for redetermination under circumstances that were alleged to have *already occurred.*[66] In so deciding, however, the court did not decide the precise issue of whether the board could grant declaratory judgment in a proper case. Furthermore, no mention was made of *Seneca* even though the same contract clause was at issue in both cases.

While there is still confusion at the boards, the Claims Court has steadfastly held to its position that it has no jurisdiction over declaratory judgment requests. In *Alan J. Haynes Constr. Systems, Inc. v. United States,*[67] the court dismissed a contractor's claim because the contractor sought no money judgment but instead requested only declaratory relief from a contracting officer's decision. The court stated that it had no jurisdiction until either the contractor submitted a money claim to the government or the government brought a money claim against the contractor. The court stated further that the legislative history of the Contract Disputes Act is clear in not conferring declaratory judgment jurisdiction on the court.

Forum Election

A contractor cannot have a change of heart after filing claims with a contract appeals board and seek to begin again at the United States Claims Court.[68] The filing with the board is a binding election under the Contract Disputes Act and deprives the court of jurisdiction even if the government has concurred in the dismissal without prejudice of the claims at the board.

Appeal of Agency Contract Appeals Board Decisions

Another issue that the Federal Circuit has addressed in the past year has been when a board decision is ripe for appeal to the Federal Circuit. The court has seemed to excuse the concept of "finality" as that term is understood in district court litigation as not being applicable to board of contract appeals proceedings. Where, however, the board does not decide all of the issues before it, the case will not be final for appeal purposes.

In *Dewey Electronics Corp. v. United States,*[69] the court held that a board decision denying four of nine claims for adjustment was final for appeal purposes even though the board remanded to the contracting officer for a determination of quantum the five claims that it allowed. The court found that the denied claims were final because only entitlement was at issue before the board. The board appeal was the result of a constructive denial of the claims by the contracting officer that did not include a decision regarding quantum. The court stated that to require that the amount of the denied claims be determined before they could be appealed would be inconsistent with the Contract Disputes Act purpose of swift, inexpensive dispute resolution.

Conversely, in *Teller Environmental Systems, Inc. v. United States,*[70] the court held that a board decision holding a contractor liable for correcting work he had performed but which had been remanded to the parties so they could determine quantum, was not a final appealable decision of the board. The decision of the board did not dispose of all of the issues before the board because the contracting officer's decision had considered both liability and damages and both rulings had been appealed to the board. The scope of this case, however, was not typical of

[60] ENG BCA No. 5148 (Nov. 23, 1986).

[61] Baranof Mental Health Clinic, ASBCA No. 33172 (Nov. 24, 1986).

[62] For in-depth discussions of this subject, see Kosarin, *Nonmonetary Contract Interpretation at the Boards of Contract Appeals,* The Army Lawyer, Sept. 1985, at 11; Phillips, *Declaratory Judgment Jurisdiction of the United States Claims Court and the Boards of Contract Appeals,* The Army Lawyer, Nov. 1986, at 21.

[63] AGBCA No. 83-228-1, *et al.*, 86-1 B.C.A. (CCH) ¶ 18,518.

[64] Seneca Timber Co. v. United States, 5 F.P.D. ¶ 56 (Fed. Cir. June 20, 1986) (No. 86-665).

[65] AGBCA Nos. 84-214-1 & 85-221-1, 85-3 B.C.A. (CCH) ¶ 18,346.

[66] Cedar Lumber, Inc. v. United States, 799 F.2d 743 (Fed. Cir. 1986).

[67] 10 Cl. Ct. 526 (1986).

[68] Mark Smith Constr. v. United States, 10 Cl. Ct. 540 (1986).

[69] 5 F.P.D. ¶ 94 (Fed. Cir. Oct. 1, 1986) (No. 86-612).

[70] 5 F.P.D. ¶ 95 (Fed. Cir. Oct. 1, 1986) (No. 85-2676).

the contract issues that are normally presented to boards because of the bifurcation practice (hearing entitlement separately from quantum) which usually occurs.

Equal Access to Justice Act

In 1985, Congress amended the Equal Access to Justice Act[71] in Public Law 99–80, 99 Stat. 183. These amendments now allow the award of attorneys fees and other expenses by boards of contract appeals in proceedings under the Contract Disputes Act. Attorneys fees may be awarded to a prevailing party only in a proceeding in which the government's position was not substantially justified, as determined on the basis of the record as a whole. As time has passed since the enactment of these amendments, several board and court decisions have clarified the parameters of a contractor's right to such fees.

In an early decision granting fees, the Armed Services Board of Contract Appeals, after determining that the contractor was a prevailing party otherwise eligible to receive attorney's fees under the EAJA, determined on the facts that the actions taken by the government were not substantially justified when they were taken. In *North Chicago Disposal Company,*[72] the Navy was not able to show that it ever had a factual basis upon which to base an assumption of fraud. Without such a basis, the Navy had nonetheless begun withholding funds from payments due appellant, the appeal of which was sustained by the board in an earlier decision.

In *Maitland Brothers Co.,*[73] the board strictly construed the amended language of the statute, holding that the jurisdiction of the board to award fees and other expenses is limited to appeals processed under the Contract Disputes Act. Maitland Brothers had elected to pursue its appeal under the 1976 disputes clause in its contract, but argued that this election did not affect the jurisdiction of the board to award fees. Maitland Brothers attempted to rely on 28 U.S.C. § 2412 (1982), another section of the EAJA, which applies to "any civil action brought by or against the United States" and includes any contract dispute. The board concluded, however, that 28 U.S.C. § 2412 applies only to court proceedings, and not to proceedings before boards of contract appeals. Board jurisdiction derives from 5 U.S.C. § 504 (1982), which is expressly limited to appeals from decisions "made pursuant to section 6 of the Contract Disputes Act of 1978."

In another decision, *Roberts Construction Company,*[74] the ASBCA narrowly construed the scope of recovery under the Act. Roberts met the threshold for recovery of fees and other expenses, it was the prevailing party, and the position of the government was not substantially justified, but Roberts was nonetheless denied any recovery. Roberts sought $830 for 31.5 hours of its project manager's time, $180 for two hours of attorney consultation, and $40 for mailing and express delivery expenses. The board found that no recovery was available for the costs of the project manager's time because he was a regular employee as opposed to an expert witness. Attorney fees are recoverable up to $75 per hour, but were denied here because Roberts failed to provide written sworn verification of the claim as required by the board's rules. The postage and express delivery expenses were also denied based on Robert's failure to verify the claim, but the board went on to indicate that such expenses were not recoverable in any event.

The ASBCA issued another jurisdictional decision in *J.M.T. Machine Co.*[75] This decision interprets section 7(c) of Pub. L. No. 99–80,[76] which extends the provisions of the EAJA to cases pending or commenced after 1 October 1981, in which applications for fees and other expenses were timely filed but were dismissed by the board for lack of jurisdiction. J.M.T.'s application for fees was dismissed by the board because J.M.T. failed to timely file its application. The board concluded that a timely application for fees was required before section 7(c) could be invoked, and that the thirty day statutory filing provision controlled. Additionally, 5 U.S.C. § 504(a)(2) (1982) requires the filing of the application within thirty days of the final disposition of the case. Here, the application was not made until nearly one year after final disposition. The board found that the statutory requirement to make an application after final disposition was jurisdictional and that a prayer for fees made before final disposition did not satisfy this requirement.

In *Pat's Janitorial Service, Inc.,*[77] the board interpreted the standard of "substantial justification." Under the EAJA, a prevailing party is entitled to fees unless the position of the government was substantially justified.[78] In applying this standard, the board followed case precedent of the Federal Circuit. The standard is "slightly more stringent than reasonably justified" and requires "more than mere reasonableness."[79] The board stated, "[t]he Government is required to show that its position, including the position taken at the agency, was clearly reasonable in view of the law and facts *then* in existence."[80]

In the instant case, the contractor prevailed on the merits because the government had withheld payments due on a contract in order to recover a previous overpayment on another contract without complying with the provisions of the Debt Collection Act of 1982.[81] The board held that prevailing on the merits is not enough unless it is also established that the government's position was not substantially justified. While it was clear, at the time that the funds were

[71] 5 U.S.C. § 504 (1982) [hereinafter EAJA].

[72] ASBCA No. 25535, 86–3 B.C.A. (CCH) ¶ 19,052.

[73] ASBCA No. 24032, 86–2 B.C.A. (CCH) ¶ 18,796.

[74] ASBCA No. 31033, 86–2 B.C.A. (CCH) ¶ 18,846.

[75] ASBCA Nos. 23928, 24298, and 24536, 86–2 B.C.A. (CCH) ¶ 18,928.

[76] 99 Stat. 183 (1985).

[77] ASBCA No. 29129, 86–2 B.C.A. (CCH) ¶ 18,995, *motion for reconsideration denied,* 86–3 BCA (CCH) ¶ 19,096.

[78] 5 U.S.C. § 504(a)(1) (1982).

[79] Pat's Janitorial Service, Inc., 86–2 B.C.A. (CCH) ¶ 18,995, at 95,923 (citing Schuenemyer v. United States, 776 F.2d 329, 330 (Fed. Cir. 1985)).

[80] *Id.* (citation omitted).

[81] 31 U.S.C. §§ 3701–3719 (1982). *See generally* DMJM/Norman Eng'g Co., ASBCA No. 28154, 84–1 B.C.A. (CCH) ¶ 17,226.

withheld, that the government was entitled to recover the overpayment, it was not entirely clear that the provisions of the Debt Collection Act applied to the withholding of such funds. The board concluded that due to the uncertainty at the time of the withholding, the government's position was clearly reasonable and, therefore, substantially justified.

In *Eastern Marine, Inc. v. United States,*[82] the Claims Court found the government's litigation position to be justified (although the Department of Justice asserted some questionable defenses). While DOJ's behavior during litigation was reasonable, however, the court determined that Congress intended to permit EAJA relief if unjustifiable government agency conduct forced the litigation in the first place. In this case, the conduct of the Coast Guard was not clearly reasonable or substantially justified and forced the contractor to vindicate its rights through litigation. Therefore, the contractor was entitled to recover under the EAJA.

Terminations

Last year, the ASBCA, in *Darwin Constr. Co.,*[83] broke from precedent by finding that the government had acted arbitrarily and capriciously in terminating a contractor for default even though the contractor was in fact in inexcusable default. Generally, motive is not questioned in such circumstances but was in this case because the action was taken solely to rid the government of having to deal with Darwin, who at the time of the termination was ready, willing, and able to complete the contract. This year, *Darwin* was reversed on reconsideration.[84]

In *Paul Callaghan & Associates,*[85] the ASBCA granted the government's motion for summary judgment in an appeal for termination for convenience costs on the ground that the contract was a blanket purchase agreement that contained only a "no cost" termination clause and no termination for convenience clause.

Debt Collection Act

Litigation concerning the Debt Collection Act,[86] one of last year's more lively topics, seemed to slow down this year. In one case, *AVCO Corp. v. United States,*[87] the government withheld payments because of a dispute over alleged delays and deficient performance. The contractor filed a certified claim with the contracting officer to obtain the progress payments that had been withheld in excess of the contractually permitted ten percent. When the contracting officer failed to issue a final decision on the matter, the contractor brought suit, claiming that the Debt Collection Act applied to the amounts withheld over the allowed ten percent. The court held that the debt in issue was not one within the meaning of the Debt Collection Act and declined to decide whether the Act applied to contracts subject to the Contract Disputes Act. The basis for withholding in this case was the contractor's inadequate performance of the same contract against which the funds were withheld. The key point here is that the basis for withholding and the actual withholding occurred under the same contract. This distinction separated this case from previous board cases that had applied the Debt Collection Act to situations where the debts had arisen under contracts that were separate from the contracts under which the offsets were taken.

Government Contractor Defense

Three manufacturers of military aircraft successfully used the government contractor defense to shield themselves from liability for the deaths of military personnel caused by defects in government-approved specifications. Jury awards totalling over $4.7 million were reversed because the aircraft had conformed to those specifications, and the contractors either had notified the government of the dangers created by complying with the specifications or were unaware of any design hazards.[88] According to the Fourth Circuit, the government contractor defense is a guard against judicial interference with matters of military discipline and design determinations are essentially military decisions.

This view did not deter the Eleventh Circuit, however, from rejecting a "military contractor" defense in an earlier case. In *Shaw v. Grumman Aerospace Corp.,*[89] the contractor was held liable for the wrongful death of a serviceman caused by a defective stabilizer system in an airplane (Grumman KA–6D) that it had exclusively designed. The court also found that the contractor knew of the defect in the control system and had failed to warn the Navy of the danger. The court apparently had no qualms about "interfering" with military decisions.

In light of the circuit courts' conflicting views on the scope of this defense, it appears that the Supreme Court may ultimately decide how broad it should be. Although the Court has not yet granted certiorari in any of the four cases, it has invited the Solicitor General to file an *amicus* brief in the *Grumman* case before making its decision on whether to hear the issue.[90] On 21 November 1986, the Department of Justice filed a brief with the Court that supports the broad expansion of the defense, and a corresponding limitation on judicial review, because of the adverse effects of litigation calling into question military judgments concerning equipment and safety matters.[91]

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[82] 10 Cl. Ct. 184 (1986).

[83] ASBCA No. 29340, 84–3 B.C.A. (CCH) ¶ 17,673.

[84] Darwin Constr. Co., *rev'g on reconsideration* 86–2 B.C.A. (CCH) ¶ 18,959. *Darwin* was reversed because it was at variance with a Senior Deciding Group decision in a similar case. *See* Nuclear Research Associates, Inc., ASBCA No. 13,563, 70–1 B.C.A. (CCH) ¶ 8237.

[85] ASBCA No. 31018, 86–2 B.C.A. (CCH) ¶ 18,757.

[86] 31 U.S.C. §§ 3701–3719 (1982).

[87] 10 Cl. Ct. 665 (1986).

[88] Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986); Dowd v. Textron, Inc., 792 F.2d 409 (4th Cir. 1986); Boyle v. United Technologies Corp., 792 F.2d 413 (4th Cir. 1986).

[89] 778 F.2d 736 (11th Cir. 1985).

[90] Grumman Aerospace Corp. v. Shaw, 106 S. Ct. 2243 (1986).

[91] *See* Fed. Cont. Rep. (BNA) No. 46, at 1052 (Dec. 22, 1986).

Fraud Abatement

Program Fraud Civil Remedies Act of 1986

As part of the Budget Reconciliation Act,[92] Congress enacted the "Program Fraud Civil Remedies Act of 1986." The purpose of this Act is to provide Federal agencies with an administrative remedy to recompense agencies for losses resulting from false or fraudulent claims or statements. The act provides for administrative proceedings and also sets forth due process protections. This act should provide a valuable tool in support of Department of Defense (DOD) efforts to combat fraud in government contracting and elsewhere.

This statute provides a civil penalty of not more than $5,000 (in addition to any other remedy prescribed by law) for making or submitting a false claim or causing such a claim to be made or submitted. In addition, when the government has made payment on such a claim, an assessment of up to twice the amount of the claim may be made. The act also provides a civil penalty of up to $5,000 for any false written statement submitted in support of a false claim. Jurisdiction is limited to a claim (or related claims) not exceeding $150,000.

Procedurally, the agency "reviewing official" (a general or flag officer or GS–16 or above) provides written notice to the Attorney General of the intent to refer a case to an agency "presiding officer" (administrative law judge or equivalent) for administrative action. The Attorney General then has ninety days to either approve or disapprove the referral. Upon approval, the reviewing official provides notice to the person allegedly liable, stating the basis of liability and advising such person of the right to a hearing. This person then has thirty days to request a hearing.

Persons alleged to be liable have the right to discovery and to an impartial hearing at which they may present evidence and cross-examine witnesses. They are entitled to representation by counsel and to an appeal. Appeal is to the agency head or designee and must be filed within thirty days. The agency head may take any appropriate action with respect to any penalty or assessment determined by the presiding officer.

Decisions of the reviewing official are not subject to judicial review. Findings of liability by either the presiding officer or agency are reviewable, however. Collection of penalties or assessments may be made by civil enforcement action, counterclaim, or administrative offset.

False Claims Amendments Act of 1986

Prior to 1986, the civil penalties for filing a false claim against the United States were set at $2,000 per claim plus double the amount of damages the United States sustained due to the false claim.[93] Section 931 of the 1986 Department of Defense Authorization Act[94] amended 31 U.S.C. § 3729 to allow, for false claims on DOD contracts, a civil penalty of $2,000 per claim, plus *three* times the amount of damages to the United States.

In October 1986, Congress again amended the False Claims Act to raise the civil penalties for submitting false claims.[95] Section 2 of the new amendments prescribe civil penalties of "not less than $5,000 and not more than $10,000, plus three times the amount of damages which the Government sustains," as well as the costs of bringing the action to recover the penalties and damages. Damages are limited to "not less than two times the amount of damages," however, if the following exception is met:

> (1) the person who submitted the false claim furnishes to the Government investigators responsible for investigating false claims all information that he or she knows about the violation within 30 days of obtaining the information;
>
> (2) the person fully cooperates with the Government investigators; and
>
> (3) at the time the person furnished the information about the false claim to the Government, the Government had not started a criminal, civil, or administrative action against the person, and he or she had no actual knowledge of the existence of any investigation into the false claim.[96]

This "full cooperation" exception is obviously supposed to provide an incentive to disclose false claims as soon as they are discovered, but the literal wording of the damages limitation is far from clear. Are damages in these cases limited to "double" damages, or can they be anywhere between "double" and "triple" damages? Also, does the penalty of "not less than $5,000 nor more than $10,000" apply in "full cooperation" cases? Further clarification of this area is needed from Congress.

The False Claims Amendments Act of 1986 also significantly changed the *qui tam*[97] provisions allowing individuals to bring actions on the behalf of the government to recover for false claims (and share in the recovery).[98] Section 3 of the Act allows courts to limit the rights of *qui tam* plaintiffs where the individual's actions are undercutting the government's ability to prosecute the case. These limitations include the number of witnesses the *qui tam* plaintiff can call, the length and scope of their testimony, and limits on the cross-examination of witnesses by the *qui tam* plaintiff. The limitations can be imposed when necessary to avoid undue delay, interference, or harassment, or when the *qui tam* plaintiff's actions are repetitious or irrelevant. Other provisions included in the amendments concern the share of the *qui tam* plaintiff's recovery in the total amount recovered, limitations on who can be sued, and a

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[92] Pub. L. No. 99–509, 100 Stat. 1185 (1986).

[93] 31 U.S.C. §§ 3729–3731 (1982) (commonly known as the False Claims Act).

[94] Pub. L. No. 99–145, 99 Stat. 689 (1986).

[95] False Claims Amendments Act of 1986, Pub. L. No. 99–562, 100 Stat. 3153.

[96] *Id.* at § 2.

[97] "An action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to the person who will bring such action." Black's Law Dictionary 1126 (5th ed. 1979).

[98] *See* 31 U.S.C. § 3730 (1982).

provision for attorney's fees for defendants against *qui tam* plaintiffs in frivolous suits.

Other significant changes to the False Claims Act include relaxing the government's burden of proof from "clear and convincing" evidence to a "preponderance of the evidence," and eliminating the requirement to prove specific intent to defraud the government.[99]

Finally, section 6 of the False Claims Amendments Act of 1986 gives the Attorney General new authority to make "civil investigative demands," which are enforceable by judicial order, on persons with information about false claims.[100] Under this authority, the Attorney General may subpoena documents, take oral testimony, and require answers to written interrogatories without filing suit first. Interestingly, the investigative powers of the DOD Inspector General (IG) were not changed by this legislation, even though he too investigates false claims as part of his duties. His power remains limited to the subpoena of documents only.

Anti-Kickback Enforcement Act of 1986

In October 1986, Congress passed the Anti-Kickback Enforcement Act of 1986,[101] the first amendments to the Anti-Kickback Act[102] in twenty-five years. These amendments simplify and strengthen the law against subcontractor kickbacks affecting the Federal procurement system in several key respects. The amendments prohibit providing, soliciting, or accepting any kickback, and any attempts to do so. Examples of kickbacks include cash, gifts, or a paid vacation given by a subcontractor to a prime contractor or a higher level subcontractor in return for an award of a subcontract or for any other purpose. The amendments also prohibit the inclusion of any amounts paid as kickbacks in any subcontract or prime contract. Prior to these amendments, the prohibition against kickbacks applied only to negotiated contracts.[103]

The criminal penalties under the Act (for knowing and willful violations) were increased to imprisonment for not more than ten years, plus fines of up to $500,000 or double the loss, whichever is greater (the former penalties were two years and $10,000). These increased penalties are now in line with other federal fraud and corruption statutes. Civil penalties were also increased, to double the amount of the kickback plus not more than $10,000 per occurrence (up from only the amount of the kickback). The amendments also include provisions for administrative offsets against moneys owed by the United States under prime or subcontracts affected by the kickback. The Debt Collection Act[104] does not apply to these offsets, and therefore contracting officers can issue final decisions concerning them under the Contract Disputes Act. These final decisions, however, can only be appealed to the Claims Court; they can not be appealed to boards of contract appeals because the administrative offset is based on fraud.

Fraud Abatement Provisions in the Defense Acquisition Improvement Act of 1986

As usual, Congress included extensive procurement reform measures in this year's DOD Authorization Act.[105] Most of these measures can be found in Title IX, the short title of which is the Defense Acquisition Improvement Act of 1986.

Commercial Pricing for Spare or Repair Parts

Section 926 of the Act requires contractors to certify that their offered prices for spare and repair parts, on contracts using other than competitive procedures, are not greater than the lowest commercial prices for the items as sold to the public. If a contractor cannot so certify, it must tell the government in writing what the difference between its offered price and its commercial price is, and explain the difference. The contracting officer may audit the contractor's books and records to verify the contractor's assertions. This requirement to certify, however, is not applicable to small purchases (less than $25,000), or where the contracting officer determines that the requirement is not appropriate for national security reasons. Furthermore, it is limited to "spare" and "repair" parts—not all items of supply. This limitation should help put an end to the controversy between OMB and the Defense Acquisition Regulatory (DAR) and Civilian Agency Acquisition Councils concerning the implementation of the original requirement to certify the lowest price of "items," which was established in the Fiscal Year 1985 DOD Authorization Act[106] and the Small Business and Federal Procurement Competition Enhancement Act.[107] Finally, there are no express penalties in the Act for falsely certifying this information.

On 18 November 1986, the DAR Council issued interim guidance concerning this section of the Act. This guidance, however, does not contain a standard contract clause, so contracting officers will be forced to make up their own. FAR coverage is expected in the near future.[108]

Conflicts of Interest in Defense Procurement

Section 931 of the Act[109] strengthens the post-government employment limitations for some government officials.

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[99] This change overrules United States v. Mead, 426 F.2d 118 (9th Cir. 1970) and other cases. *See* §§ 2 and 5 of the False Claims Amendments Act of 1986, Pub. L. No. 99–562, 100 Stat. 3153.

[100] 31 U.S.C. § 3733 (1982).

[101] Pub. L. No. 99–634, 100 Stat. ___ (1986).

[102] 41 U.S.C. §§ 51–54 (1982).

[103] 41 U.S.C. § 51 (1982).

[104] 31 U.S.C. §§ 3701–3719 (1982).

[105] Pub. L. No. 99–661, 100 Stat. ___ (1986).

[106] Pub. L. No. 98–525, 98 Stat. 2492 (1986).

[107] Pub. L. No. 98–577 98 Stat. 3065 (1986). *See* 10 U.S.C. § 2323 (1982).

[108] Fed. Cont. Rep. (BNA) No. 46, at 941 (Dec. 1, 1986).

[109] To be codified at 10 U.S.C. § 2397b.

This section expands and makes permanent last year's enactment, in Section 921 of the Defense Procurement Improvement Act of 1985,[110] of a two year ban on accepting employment or compensation with certain DOD contractors.

The ban applies to officials (O–4 or GS–13 and above) who, for a majority of their "working days" within two years before leaving DOD: were assigned to the contractor's plant site; participated in decision-making involving the contractor's major defense system; or were senior officials (O–7 or SES position and above) who acted as primary representatives in contract or settlement negotiations with the contractor involving more than $10 million. The ban does not apply to non-DOD contractors, or to DOD contractors having contracts totalling less than $10 million in the past year.

The Act also imposes a requirement on contractors to report annually to the government a list of all employees meeting the above categories, which will require monitoring by the Department of Defense or the appropriate military department. Those who fail to file a report are subject to an administrative penalty of up to $10,000. It also prescribes civil penalties for violations of the ban, of up to $250,000 for individuals or $500,000 for companies that hire them. Furthermore, all DOD contracts greater than $100,000 must contain an agreement by the contractor not to violate the ban, and liquidated damages provisions for knowingly violating it ($100,000 or three times the amount of compensation paid to the individual, whichever is greater). These provisions[111] should help dispel the appearance of and deter any actual occurrence of conflicts of interest.

Contractor Employees Convicted of Felonies

Section 941 of the Act prohibits persons convicted of fraud or other DOD contract-related felonies from serving on a board of directors of a defense contractor, and from working in any supervisory job on any defense contract. This bar can be imposed by the Secretary of Defense, and must last for at least a year. There is no upper time limit specified in the section. Also, a contractor who ignores the bar is subject to a criminal penalty of up to $500,000.

Whistle-blower Protection of Contractor Employees

Section 942 of the Act adopts a requirement that the DOD IG investigate and review a contractor employee's complaint of reprisal (discharge, demotion, etc.) for disclosure of a substantial violation of law involving a defense contract. Although no other new provisions for legal protection of whistle-blowers were adopted, reprisals against employees of defense contractors for disclosures of such violations are still prohibited. It is also interesting to note that the House version of the Act contained a section 921 that would have provided for administrative and judicial review of alleged reprisals against military members who disclose fraud or waste of government funds. The Conference Report[112] deleted this provision before the statute was passed, however.

Truth-in-Negotiations Act Amendments

Section 952 of the Act amended the Truth-in-Negotiations Act[113] by adding a new section, 10 U.S.C. § 2306a, that eliminates several defenses that contractors had used successfully against government claims of defective pricing. Now it is no longer a defense that: the contractor was the sole source for the item, or otherwise was in a superior bargaining position to the government; the contracting officer should have known that the cost or pricing data were defective; the agreement was based on total cost; or the contractor did not submit a certification. The amendments also now prohibit offsets when the contractor intentionally withholds more accurate, complete, and current cost or pricing data that would have indicated a higher price for the item. Hopefully, these changes will significantly help the government pursue more and larger price reductions for defective pricing.

The Taft Letter: DOD Program for Voluntary Disclosure of Possible Fraud by Defense Contractors

In July 1986, Deputy Secretary of Defense Taft published a letter encouraging defense contractors to adopt a policy of voluntary disclosure of possible fraud as part of their corporate integrity programs. Accompanying the letter was a description of the new DOD program of voluntary disclosure. If a contractor meets the requirements of a "volunteer" (disclosure not triggered by imminent discovery of the facts by the government; disclosure is on behalf of the corporation as opposed to individuals; prompt and complete corrective action is taken; and the contractor cooperates with DOD after disclosure), DOD is prepared to: identify for the contractor one of the military departments or the Defense Logistics Agency as responsible to represent DOD for suspension or debarment purposes; expedite any necessary investigation or audit; and advise the Department of Justice of the complete nature of the voluntary disclosure, the extent of cooperation, and the corrective action instituted by the contractor.[114]

Debarment and Suspension

The number of debarments and suspensions within DOD continues to rise. In the last half of Fiscal Year (FY) 1986, there were 222 contractors debarred and 246 suspended, up from 193 and 224 respectively. Also, fines, forfeitures, recoveries, and civil settlements more than doubled, from $30.3 million to $71.7 million.[115]

Coordination of Remedies: Paradyne *Predicament*

The importance of timely and coordinated action when dealing with contract fraud was demonstrated in *Paradyne*

[110] Pub. L. No. 99–145, 99 Stat. 693 (1986)

[111] To be codified at 10 U.S.C. § 2397c.

[112] H.R. Rep. No. 99–1001, 99th Cong., 2nd Sess. 507 (1986).

[113] 10 U.S.C. § 2306 (1982).

[114] Letter from William H. Taft, IV (24 July 1986), *reprinted in* Fed. Cont. Rep. (BNA) No. 46, at 292–93 (Aug. 11, 1986).

[115] Fed. Cont. Rep. (BNA) No. 46, at 1007 (Dec. 15, 1986).

Corp. v. Department of Justice.[116] Paradyne Corporation was awarded a contract in 1981 by the Social Security Administration (SSA). The contract had been renewed through the exercise of options every year including 1986. Paradyne was indicted in December 1985 for bribery and other fraud offenses relating to the award of this contract. In August 1986, the Department of Justice filed a civil suit against Paradyne, alleging a violation of the False Claims Act[117] for each claim submitted by Paradyne under the contract since its inception on the theory that the contract was null and void due to Paradyne's fraud in obtaining the contract. As the contract was ongoing, Paradyne sought a declaratory judgment to preclude the government from finding Paradyne liable for false claims under the current option period. The court found that the government acted arbitrarily and capriciously in, on the one hand, suing Paradyne for fraud, while on the other hand continually extending the contract. The court held that either the SSA must relieve Paradyne from the requirement to perform under the contract, or DOJ must limit its civil fraud action to past performance.

Fraud Jurisdiction

One government contractor presented a novel ground for board jurisdiction in *General Dynamics, Pomona Division.*[118] General Dynamics appealed, as a "final decision," and indictment returned in the District Court for the Central District of California.[119] The indictment was based on allegations of cost mischarging relating to Division Air Defense System (DIVAD) contracts. The board found that there was in fact no basis for appeal as the indictment did not constitute a final decision, nor was there any other pending contractor or government claim. The board went on to say that, even if there were a proper appeal, it would nonetheless dismiss it for lack of jurisdiction because of the pending criminal action.

The decision of the board was not, however, the last word on this issue. On 15 September 1986, the district court, on the basis of a defense motion, referred specific questions relating to the contract issues in the case to the board. The basis of the court's order was the doctrine of primary jurisdiction.[120] The Department of Justice has appealed this order.[121]

Military Authority to Exclude Contractor Employees From Installations

In *S.A.F.E. Export Corp. v. United States,*[122] the Army entered into a non-personal services contract for periodic testing and maintenance of certain security systems located in arms rooms and other secured areas in Germany. When the contractor requested installation passes for two of its employees so that they could perform the work, however, the person responsible for issuing the passes refused to issue one to one of the contractor's employees because of the employee's conviction by a German court for tax fraud. The contractor asserted before the ASBCA that it was entitled to an equitable adjustment because of the government's action, and that the contract should have been terminated for convenience. The ASBCA denied the contractor's appeal, and the Court of Appeals for the Federal Circuit upheld the ASBCAS's decision, stating that the military has broad discretion to exclude a contractor's employee from military installations, as long as that exclusion is not arbitrary, discriminatory, nor an abuse of discretion.

Protection of "Whistle-Blowers"

Last year, in *Special Counsel v. Starrett,*[123] the Merit Systems Protection Board (MSPB) ordered the removal of the Director of the Defense Contract Audit Agency (DCAA) for reassigning a DCAA auditor in retaliation for "whistleblowing" about overcharging by Pratt & Whitney Aircraft. The Fourth Circuit reversed the MSPB's decision, however, stating that the reassignment of the auditor was in accord with DCAA's standard rotation policy, and that there was "simply no evidence" that the reassignment was done in retaliation for the auditor's whistle-blowing.[124]

Potpourri

Publication Requirements

The Army Federal Acquisition Regulation Supplement § 5.203[125] now requires contracting officers to verify publication of each synopsis in the *Commerce Business Daily (CBD),* and to document the contract file with evidence of publication.

The Defense Acquisition Improvement Act of 1986[126] continues a trend toward congressional "regulation" by statute of the various publication requirements. The first of its two changes concerns the dollar threshold for synopsizing in the CBD. Previously, every proposed contract action, with certain exceptions not relevant here, that was expected to exceed $10,000 had to be furnished to the Secretary of Commerce for publication in the CBD.[127] Section 922 of the Defense Acquisition Improvement Act increases the dollar threshold to $25,000 (except in cases where there is not a reasonable expectation that at least two offers from

[116] No. 86–2609 (D.D.C. 3 Nov. 1986) (order granting declaratory relief).

[117] 31 U.S.C. §§ 3729–31 (1982).

[118] ASBCA No. 32297, 86–2 B.C.A. (CCH) ¶ 18,903.

[119] United States v. General Dynamics Corp., No. 85–1123–FFF (C.D. Cal. filed 2 Dec. 1985).

[120] United States v. General Dynamics Corp., No. 85–1123–FFF (C.D. Cal. 15 Sept. 1986) (defense motion granted in part).

[121] United States v. General Dynamics Corp., No. 85–1123–FFF (C.D. Cal. 15 Oct. 1986) (notice of appeal filed).

[122] No. 86–866 Fed. Cir. Oct. 14, 1986), 5 F.P.D. § 100, *affirming* S.A.F.E. Export Corp., ASBCA No. 29333, 85–2 B.C.A. (CCH) § 18,138, motion for reconsideration denied, 85–3 B.C.A. (CCH) § 18,404.

[123] 28 M.S.P.R. 60 (M.S.P.B. 1985).

[124] Starrett v. Special Counsel, 792 F. 2d 1246 (4th Cir. 1986).

[125] Army Federal Acquisition Regulation Supplement § 5.203 (1 Dec. 1984).

[126] Title IX of the 1987 Defense Authorization Act, Pub. L. No. 99–661, 100 Stat.___(1986).

[127] 15 U.S.C. § 637(e) (1982); 41 U.S.C. § 416(a) (1982).

responsive, responsible sources will be received—in these cases the threshold remains at $10,000), which is the same dollar limit for using the small purchase procedures of FAR Part 13. This should result in a significant savings in both cost and administrative effort, as well as reducing the lead time required to process small purchases between $10,000 and $25,000. Competition by small businesses may be adversely affected by the expected reduction in the number of contract actions synopsized, however. Also affecting small businesses is this section's increase in the maximum dollar threshold (from $10,000 to $25,000) of contracts that *must* be set aside for small businesses. [128]

Section 922 of the Defense Acquisition Improvement Act also attempts to make statutory the requirement in the Defense Federal Acquisition Supplement § 5.101 [129] to post in a public place in the contracting office a notice of all solicitations expected to exceed $5,000. Poor draftsmanship of this provision, however, has resulted in two significant differences between the statute and the existing regulation. First, the statute applies by its terms only to contract actions expected to exceed $5,000 but not $25,000, whereas DFARS § 5.101 applies to all contract actions expected to exceed $5,000. Second, the regulation requires the posting of "each solicitation . . . *which provides at least 10 calendar days for submission of offers.*" [130] In other words, the regulation does not require posting of "urgent requirements." The new statute, on the other hand, states that solicitations for bids or proposals shall be posted "for a period not less than ten days." The statute, therefore, does not exempt urgent requirements from the posting requirement, which means that Congress has effectively prevented DOD from fulfilling its urgent requirements that happen to fall within the $5,000 to $25,000 range, at least in any time less than ten days.

Failure to Acknowledge Invitation for Bids Amendment Increasing Wage Rates

GAO has reversed its position on whether a bidder who fails to acknowledge an Invitation for Bids (IFB) amendment that increases the applicable wage rate prescribed by the Secretary of Labor may cure the defect after bid opening when the bidder's employees are not covered by a collective bargaining agreement binding the bidder to pay wages not less than the increased wage rate determination. In an earlier case, GAO had decided that if the increase in the wage rate determination had only a de minimus effect on price, then the government could consider a bid, under the minor informality exception, which fails to acknowledge such an IFB amendment. [131] This decision was an extension of a still earlier decision that created a limited exception to the requirement to acknowledge IFB amendments that increase wage rate determinations where the bidder already has a collective bargaining agreement obligating the bidder to pay its employees *more* than the increased wage rates. [132] After these two cases were decided, the Claims Court held in *Grade-Way Constr. v. United States* [133] that even though the wage rate increase was clearly *de minimus,* the failure to acknowledge the amendment could not be cured because the bidder was not bound to pay the higher wages and could therefore elect whether to accept award of the contract or withdraw its bid. GAO has now decided that the analysis and position of the Claims Court is more correct, and has overruled its decision in 85-1 CPD ¶ 34 to follow the *Grade-Way* holding. [134]

Options

Evaluation

Section 925 of the Defense Acquisition Improvement Act of 1986 prohibits DOD from awarding a sealed bid contract based on the evaluation of option prices if there is no reasonable likelihood, at the time of evaluation and award, that the options would in fact be exercised. If there is a reasonable likelihood that the options will be exercised, of course, the government may consider option prices in evaluating the bids.

Availability of funds

In *Lier Siegler, Inc.,* [135] the government contracted for a base period ending on 30 September 1984 and for a twelve-month option commencing 1 October 1984 which had to be exercised no later than 15 September 1984. In exercising the option, the government added the standard availability of funds clause which had not been included in the original contract. The board found this to be an invalid exercise and a counteroffer by the government. The lesson is to include the availability of funds clause in all contracts in which funding for the base or any option periods may be a problem.

Consideration for Modifications

Where the ASBCA found there to be no consideration for a contract modification, it declared the modification unenforceable. Under the original contract, the contractor could have delivered all units on the last day of the performance period. By modification, the government required delivery of two units per day and imposed liquidated damages for late delivery. The contractor agreed, but got no consideration. Therefore, the modification was unenforceable. [136]

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[128] *See* 15 U.S.C. § 644(j) (1982).

[129] Department of Defense Federal Acquisition Regulation Supplement (1 Apr. 1984) (1986 ed.) [hereinafter DFARS]

[130] DFARS § 5.101 (emphasis added).

[131] United States Dep't of Interior—Request for Advanced Decision, Comp. Gen. Dec. B-217303 (Jan. 11, 1985), 85-1 CPD ¶ 34.

[132] Brutoco Eng'g & Constr. Inc., Comp. Gen. Dec. B-209098 (Jan. 4, 1983), 83-1 CPD ¶ 9.

[133] 7 Ct. Cl. 263 (1985).

[134] ABC Paying Co., Comp. Gen. Dec. B-224408 (Oct. 16, 1986), 86-2 CPD ¶ 436.

[135] ASBCA No. 30224, 86-3 B.C.A. (CCH) ¶ 19,155.

[136] Shipco General, Inc., ASBCA No. 29206, 86-2 B.C.A. (CCH) ¶ 18,973.

Fiscal Law

The GSBCA decided in *Wordplex Corp.*[137] that "questions as to funding have no place in the consideration of the remedy to be imposed" in a protest. The government had argued that a termination for convenience as requested by the protestor would result in a loss of obligated funds.

In another decision, the GSBCA held that the fact that funds would expire for obligation purposes likewise cannot provide justification for unequal treatment of offerors.[138]

Commercial Activities Program

A revision to Army Regulation 5–20[139], published on 20 October 1986, contains several significant modifications implementing statutory and regulatory changes enacted since the regulation was originally published on 1 February 1985. First, exemption criteria for national defense has been expanded to include (in addition to deployability, military training, and rotation base) special security considerations and core logistics. Special security considerations apply to commercial activities for which contractor operations pose an unacceptable risk to national security. Core logistics mean depot level maintenance of mission-essential materiel at Army depots.[140] Second, the threshold for converting directly to contract without conducting a cost study is raised to "more than 40 civilian employees."[141] Note, however, that a management analysis to determine the most efficient organization must nonetheless be conducted when there are more than ten affected employees.[142] And finally, performing an economic effects analysis is now required only when there are seventy-five military or civilian employees directly affected.[143]

DOD published a draft revision to its guidance on commercial activities in the *Federal Register* on 3 December 1986.[144] This revision implements, DOD Directive 4001.1,[145] which calls for decentralized decision-making at the installation level. Significantly, installations will retain a percentage of the savings achieved through efficient management.

Section 1221 of the National Defense Authorization Act for Fiscal Year 1987[146] amends 10 U.S.C. § 2304 note (1982) to allow direct conversion to contract without a cost study when there are forty-five or fewer civilian employees. Section 9078 of the Omnibus Appropriations Act,[147] on the other hand, mandates the development of a most efficient organization before conversion to contract whenever there are more than ten civilian employees.

Section 1222(a) of the 1987 DOD Authorization Act creates a new § 2693 of Title 10, United States Code, making permanent the moratorium on contracting out fire fighting functions at military installations. Section 1222(b) extends for one year (through 30 September 1987) the moratorium on contracting out security guard functions at military installations.

Security Guard Contracts

Army Regulation 190–56[148] now requires all contracts for security guards to include provisions that subject contract security guards to the same drug abuse testing requirements as Army employees working similar jobs.[149] This new requirement has not yet been implemented in the AFARS, probably because implementation of drug abuse testing is both complex and costly. Furthermore, it is unclear whether the testing requirements will apply only to future contracts, or also to existing contracts for guard services.

DOD Organization and Personnel

DOD Reorganization Act

The Goldwater–Nichols Department of Defense Reorganization Act[150] was enacted on 1 October 1986. The statute requires extensive reorganization of DOD and the military departments to serve several purposes, the first of which is to strengthen civilian authority in DOD.[151] One item of particular significance to the contracting community is that both the acquisition and comptroller functions are the sole responsibility of the Office of the Secretary of the Army.[152] The impact of this on the way we do business is not yet known, but is something to watch for this year.

Defense Enterprise Programs

Section 905 of the Omnibus Appropriations Act[153] calls for the establishment of Defense Enterprise Programs (at least three by FY 88) to increase the efficiency of the management structure by reducing the number of officials

[137] GSBCA No. 8193–P–R, 86–2 B.C.A. (CCH) ¶ 18,820.

[138] Computer Lines, GSBCA No. 8206–P, 86–1 B.C.A. (CCH) ¶ 18,653.

[139] Dep't of Army, Reg. No. 5–20, Commercial Activities program (20 Oct. 1986) [hereinafter AR 5–20].

[140] AR 5–20, para. 2–3*b*.

[141] *Id.*, para. 4–2.

[142] *Id.*, para. 4–2*c*.

[143] *Id.*, Appendix E.

[144] 51 Fed. Reg. 43621 (1986).

[145] Dep't of Defense Directive No. 4001.1, Installation Management (Sept. 4, 1986).

[146] Pub. L. No. 99–661, 100 Stat. ___ (1986), [hereinafter 1987 DOD Authorization Act].

[147] Continuing Appropriations, Fiscal Year 1987, Pub. L. No. 99–591, 100 Stat. ___ (1986).

[148] Dep't of Army, Reg. No. 190–56, The Army Civilian Police and Security Guard Program (10 Sept. 1986) [hereinafter AR 190–56].

[149] *See id.*, para. 2–4.

[150] Pub. L. No. 99–433, 100 Stat. 922 (1986).

[151] Pub. L. No. 99–433, § 3.

[152] *Id.* § 501.

[153] Continuing Appropriations, Fiscal Year 1987, Pub. L. No. 99–591, 100 Stat. ___ (1986) [hereinafter the Omnibus Appropriations Act]

through whom a project manager (PM) reports to the military department senior procurement executive. The law provides for the PM to report directly (without intervening review or approval) to the program executive officer, who reports directly to the procurement executive officer.

Under Secretary of Defense for Acquisition

Sections 901 and 902 of the Omnibus Appropriations Act create the positions of Under Secretary and Deputy Under Secretary of Defense for Acquisition. The Under Secretary is designated the senior executive for DOD and the Defense Acquisition Executive with responsibilities to supervise and establish policy for DOD acquisitions. The statute specifically does not negate the audit authority of the DOD IG under the Inspector General Act of 1978.[154]

Professionalism of Acquisition Personnel

Section 932 requires the Secretary of Defense, in order to enhance the professionalism of acquisition personnel, to develop a plan to establish standards for examination, appointment, classification, training and assignment of personnel.

Major Systems Acquisitions

Baseline Description Requirement

Section 904 of the Omnibus Appropriations Ace requires the establishment of a Baseline Description before a program enters full-scale engineering development and again before full-rate production. Program Deviation Reports are required if: the Baseline Description cost of completion will be exceeded; milestones will not be completed; or performance description, technical characteristics, or configuration will not be fulfilled.

Funding of Major Systems

Section 905 of the Act further provides for Congress to authorize funds for the full-scale engineering or full-rate production stages in a single amount sufficient to carry out that stage (but not for more than five years).

Nondevelopmental Items

Section 907 requires the Secretary of Defense to ensure that, to the maximum extent possible, requirements are defined by using, and impediments are removed from procuring, nondevelopmental items. Nondevelopmental items are those items available commercially or a previously developed item of supply that requires only minor modification.

Competitive Prototype Strategy

Section 909 requires the development of a Competitive Prototype Strategy for major defense systems (estimated system cost $200,000,000 or more of Research, Development, Test and Evaluation (RDT&E) funds). The strategy requires contracts to be awarded to at least two contractors for the prototype, followed by side-by-side testing, and the submission by contractors of estimates for full-scale engineering development and production.

Testing of Major Systems Prior to Production

Section 910 provides that "covered" major systems, and munitions, missiles, or major acquisitions programs may not proceed beyond low-rate initial production until realistic survivability, lethality, and operational testing have been completed.

Alternate Sources

Section 9056 prohibits full-scale engineering development by one contractor of any major defense acquisition program until the Secretary of Defense certifies that the system or subsystem will not be procured in sufficient quantities to warrant two or more sources.

Technical Data

Section 953 of the Omnibus Appropriations Act requires the Secretary of Defense to promulgate regulations defining the rights of the government and contractors with respect to technical data.

Use of Other Than Competitive Procedures

Section 923 of the Omnibus Appropriations Act authorizes the use of other than competitive procedures when property or services are available from only one responsible source or only from a limited number of responsible sources.

Services

Section 923 of the Omnibus Appropriations Act redefines unsolicited research proposals to include a service for which the source demonstrates its own unique capability to provide. Highly specialized services are included in those acquisitions by follow-on contracts that may be awarded by other than competitive procedures.

Section 924 of the Omnibus Appropriations Act requires that evaluation factors for competitive proposals "clearly establish the relative importance assigned to the quality of the services to be provided (including technical capability, management capability and prior experience of the offeror)."

Allocation of Overhead

Section 927 of the Omnibus Appropriations Act requires the Secretary of Defense to promulgate regulations requiring contractors to identify supplies that it did not manufacture or to which it did not contribute significant value in order to properly allocate overhead. The regulation is not to apply to supplies based upon catalog or market prices of commercial items sold in substantial quantities to the general public.

Undefinitized Contracts

Section 908 of the Omnibus Appropriations Act provides that the amount obligated each six months for undefinitized contracts within DOD and each military department may not exceed ten percent of the total amount obligated during that time period (except as waived by the Secretary of Defense for urgent and compelling reasons). Undefinitized contracts must provide for definitization within 180 days

[154] Pub. L. No. 95-452, 92 Stat. 1101 (1978).

from award or prior to expenditure of more than fifty percent of the ceiling price, whichever occurs first. Furthermore, the scope of an undefinitized contract may not be modified unless approved by the agency head.

OMA Funding of Investment Items

Last year, Congress raised the dollar limit from $3,000 to $5,000 on the use of Operation and Maintenance, Army (OMA) funds to purchase investment items.[155] This year's DOD Authorization Act, however, contains no such provision. As the 1986 provision was not a part of any permanent legislation included in that Act, it is unclear whether the limit remains at $5,000, whether the limit reverted back to $3,000, or whether *any* FY 1987 OMA funds can be used for this purpose.

Multiyear Contracting

Section 911 of the Defense Acquisition Improvement Act of 1986 established a goal for the Department of Defense to increase its use of multiyear contracts during FY 1988 to not less than ten percent of DOD's total obligational authority for procurement programs. The section further requires the Secretary of Defense to report to Congress by 1 January 1987 on how this goal will be met.

Contract Costs

The Court of Appeals for the Federal Circuit has affirmed a decision of the Armed Services Board of Contract Appeals that a Defense Acquisition Regulation cost allocation provision was inconsistent with the allocation requirements of Cost Accounting Standard (CAS) 412.[156] Because the Department of Defense had indicated that in conflicts between a regulation with respect to allocability and the CAS, the CAS would supersede the regulation, any other conclusion would allow DOD to exercise its procurement authority in an arbitrary manner.

The Omnibus Appropriations Act included a direction to DOD to immediately institute new "profit calculation procedures" for negotiated defense contracts that link profit to financial risk. Consequently, DOD has decided to reissue its profit proposal of September 1986 as an interim rule that will apply retroactively to 18 October 1986. The profit policies emphasize capital investment as a key factor in determining profit. The law specifies that profit should not be based on individual elements of contract cost.[157]

With certain exceptions, contractor travel costs are "reasonable and allowable" only if they "do not on a daily basis" exceed the per diem rates for government civilian employees.[158]

Terrorism

Section 951 of the Omnibus Appropriations Act prohibits awarding of contracts of $100,000 or more to companies owned or controlled by governments providing support for international terrorism.

Nonappropriated Fund Instrumentalities

Section 313 of the 1987 DOD Authorization Act creates § 2488, title 10 U.S.C., which requires that purchases of alcoholic beverages by nonappropriated fund instrumentalities for resale at installations within the United States be from the most competitive source. As an exception, malt beverage and wine purchases for resale within the contiguous states must be from a source within the state in which the installation is located.

Use of Government Transportation

Congress has amended 31 U.S.C. § 1344 to place new restrictions on the use of government vehicles for transportation of officers and employees for other than official purposes.[159] The amended statute provides that funds available to the United States (by appropriation *or otherwise*) may be used for the maintenance, operation, or repair of any passenger carrier only to the extent that it is used to provide transportation for official purposes. Transportation from residence to place of employment is not transportation for an official purpose unless the statute specifically authorizes such transportation.

Specifically designated officials are granted an exception in the statute: officials such as the Secretary of Defense, the service secretaries, and the Joint Chiefs of Staff. Additionally, agency heads may authorize "home to work" transportation for field work, intelligence and counterintelligence activities, and law enforcement duties. Finally, agency heads may authorize "home to work" transportation based on a determination that highly unusual circumstances present a clear and present danger, that an emergency exists, or that other compelling operational considerations make such transportation essential. Authorizations pursuant to this final authority are generally limited to fifteen days duration. If the grounds for the authorization extend or may extend beyond the fifteen day period, the agency head may determine to extend the authorization for a period of not more than ninety days. Upon review at the end of such periods, agency heads may grant further authorization for a period not to exceed ninety days.

Debt Collection Act Amendments

The Debt Collection Act[160] was also amended.[161] The amendments granted the Attorney General new authority to contract with private counsel[162] to furnish legal services

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[155] Pub. L. No. 99-145, § 303, 99 Stat. 616 (1985).

[156] United States v. Boeing Co., 5 FPD ¶ 93 (Fed. Cir. Oct. 1, 1986) (No. 86-927).

[157] Fed. Cont. Rep. No. 46, at 733 (Oct. 27, 1986).

[158] Federal Civilian Employee and Contractor Travel Expense Act of 1985, Pub. L. No. 99-234, 99 Stat. 1756; 41 U.S.C. § 420. Final rules were published to reflect this change. 51 Fed. Reg. 27, 488 (1986).

[159] Pub. L. No. 99-550, 100 Stat.___(1986).

[160] 31 U.S.C. § 3718 (1982).

[161] Pub. L. No. 99-578, 100 Stat.___(1986).

[162] In accordance with the competition requirements of 41 U.S.C. §§ 251-253 (Supp. II 1984).

in cases of indebtedness owed the United States. Services under such contracts may extend to collection of claims through litigation. The Attorney General is directed to make his best efforts to enter into contracts with firms owned or controlled by socially and economically disadvantaged individuals, to allow agencies to meet their statutory goal of referring ten percent of all amounts of claims submitted to private counsel to socially and economically disadvantaged firms. The amendments also direct the Attorney General to provide Congress an annual report on Department of Justice activities to recover debts owed the United States that were referred to the Department for collection.

Conclusion

We hope this article will serve as a reference tool to aid field attorneys in staying current in subjects relating to acquisition law. We expect developments to continue at a rapid pace throughout 1987. We will continue our efforts to keep you informed through publication of contract law notes in the TJAGSA Practice Notes section of *The Army Lawyer* as these changes occur.

The Proposed Rules of Professional Conduct: Critical Concerns for Military Lawyers

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They started slowly. But state by state, with increasing momentum, the new Model Rules of Professional Conduct have begun to displace the Code of Professional Responsibility.[1] The Department of the Army and the other uniformed services now must decide which set of standards will govern military lawyers in the future. This article summarizes the evolution of the new Rules and identifies salient issues arising from application of the Rules in a military environment.

Back to the Future: A Glimpse of History

In 1836, Baltimore practitioner David Hoffman published "Fifty Resolutions" containing standards of lawyer behavior. Two decades later, in 1854, George Sharswood, Dean of the University of Pennsylvania Law School and eventual Chief Justice of the Pennsylvania Supreme Court, delivered a series of lectures on legal ethics. These lectures formed the basis of the Canons of Professional Ethics adopted by the Alabama State Bar Association in 1887. The Canons, in turn, were adopted with modifications by the American Bar Association (ABA) in 1908.

The Canons contained aspirational statements about lawyers and law practice. By the 1960s, aspirations alone had proven unsatisfactory as tools to regulate lawyer conduct. The Canons suffered from excess generality and ambiguity, causing Professor Anthony Amsterdam to opine that they provided lawyers with as much useful guidance in their work as a valentine would furnish a heart surgeon.[2]

In 1964, ABA President Lewis F. Powell, Jr., appointed a special committee to develop standards "capable of enforcement."[3] Powell's Committee on Evaluation of Professional Standards authored the Model Code of Professional Responsibility. The Code was approved by the ABA House of Delegates in 1970, and soon was adopted by jurisdictions throughout the United States. The Department of the Army adopted the Code by regulation, applying it to all judge advocates as well as to other lawyers involved in court-martial proceedings.[4] To make the standards of conduct more readily enforceable, the Code coupled "Ethical Considerations" (ECs) with "Disciplinary Rules" (DRs). The DRs provided grounds to impose sanctions for professional misconduct. The ECs, retaining the flavor of the former Canons, were described in the Code as "aspirational in character, represent[ing] the objectives toward which every member of the profession should strive."

The Code had been in existence less than a decade when a movement began to modify or to abolish it. The Code's schizoid presentation of DRs and ECs created confusion as to what was enforceable and what was not. Some states arguably distorted the Code by adopting the DRs without the ECs. Moreover, neither the DRs nor the ECs covered many practical questions encountered in the practice of law. These questions were addressed by "ethics opinions" of the ABA and of the adopting jurisdictions. The opinions varied considerably in content, quality, and accessibility.

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[1] During 1983 and 1984, only two states substantially adopted the Model Rules. From January, 1985, through December, 1986, however, several more states followed suit and the bar associations of other additional states recommended similar action. The jurisdictions where the new Rules now stand approved entirely or in principle, by court rule or legislation, are New Jersey, Arizona, Delaware, Montana, Minnesota, Missouri, Washington, Arkansas, Nevada, New Hampshire, North Carolina, Maryland, New Mexico, Connecticut, Florida, and Idaho.

[2] *Time Magazine,* May 13, 1966, at 81, *cited in* Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement,* 1980 Am. B. F. Res. J. 939, 939 (1980).

[3] Armstrong, *A Century of Legal Ethics,* 64 A.B.A. J. 1063, 1069 (1978).

[4] *See* Dep't of Army, Reg. No. 27-1, Legal Services—Judge Advocate Legal Services para. 5-3 (1 Aug. 1984) ("all JAs and civilian attorneys of the JALS"); Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 5-8 (1 July 1984). ("military judges, counsel and clerical personnel of Army courts-martial").

In 1977, the ABA created another committee, the Commission on Evaluation of Professional Standards. This body came to be known as the "Kutak Commission," in honor of its chairman, the late Robert J. Kutak, a lawyer from Omaha, Nebraska. During 1980 and 1981, the Kutak Commission issued a "discussion draft," followed by a "tentative draft," of proposed new Model Rules of Professional Conduct. After a spirited—and, in some instances, acrimonious—response from state and local bars, as well as from special interest organizations, practitioners, and professors, the Committee prepared a revised "final draft" in 1982. The draft was adopted, with further amendments, by the ABA House of Delegates in 1983.

In 1984, a working group drawn from the various uniformed services studied the feasibility of adopting the new ABA Rules in the military. The group prepared, and forwarded to The Judge Advocate General of each service, a proposed set of Rules corresponding to the ABA model, with modifications deemed appropriate to military needs and situations. The proposed military Rules now await action by the services.

During their evolution, the ABA and military Rules have come to differ from the existing Code in three fundamental respects. First, the *structure* is different. The existing Code is organized around broad statements of ethical aspirations carried over from the old Canons of Ethics. The proposed Rules are organized by specific professional functions and relationships—*e.g.*, the lawyer-client relationship, the lawyer as a counselor, the lawyer as an advocate, etc. This structure now pervades the current literature on professional standards.[5]

The second fundamental difference is *substantive*. The proposed Rules explicitly provide, while the existing Code scarcely recognizes, that lawyers today are not merely representatives of their clients. They also are officers of the legal system and public citizens with special responsibilities for the fair resolution of disputes and the effective administration of justice. The Rules acknowledge that many ethical problems arise not from dishonesty but from the conflicting demands placed upon lawyers by these competing roles. The Rules laudably undertake to resolve such conflicts by striking balances or assigning priorities among the role requirements. Although the Rules may accomplish this daunting task imperfectly, they still provide more comprehensive and useful guidance than does the Code.

The third difference relates to *enforcement*. The proposed Rules define minimum acceptable behavior. They are not aspirational. As one distinguished commentator has noted:

> The Model Rules . . . represent the culmination of a historical process that began a century and a half ago: the shift from articulating professional standards, suffused with ideas of morality and ethics, and enforced if at all by informal sanctions and peer pressure, to enacting comprehensive and explicit legislation attended by formally imposed sanctions for breach.[6]

Some might say this is a melancholy comment on the legal profession. It signifies that lawyers are not unique; they, like everyone else, need specific rule rather than lofty goals to guide their behavior. Others would say that the new Rules are realistic in this regard and may be more effective in producing ethical conduct than were its aspirational predecessors.

Whose Rules Apply? Questions and Caveats about Jurisdiction

The proposed military Rules undertake not only to address the competing roles that lawyers play, but also to prescribe standards broadly applicable to diverse categories of lawyers who populate the military legal system. "Military lawyers" include: judge advocates serving a command; legal assistance officers engaged in office practice or, where permitted, representing soldiers in civilian courts;[7] Reservists performing a variety of tasks on temporary duty; civilian attorneys who practice law under the disciplinary control of The Judge Advocate General; and civilian attorney representing soldiers before military tribunals. The difficulties of balancing and assigning priorities to competing roles are greatly increased by the heterogeneous characteristics of the role players. These difficulties are illustrated by the question of disciplinary jurisdiction.

Proposed military Rule 8.5 is disarmingly straightforward. It simply states, "Lawyers shall be governed by these Rules of Professional Conduct." On the surface, this language does not seem to conflict with the ABA's Model Rule 8.5: "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." The comments appended to the Rules, however, disclose that the underlying policies are profoundly different.

Although the ABA and military comments both recognize the concurrent jurisdiction of disciplinary authorities, the military comment declares that the military standards of conduct shall govern. "To the extent that these Rules conflict with a lawyer's obligations under the licensing jurisdiction's ethical standards, these Rules are controlling."[8] In contrast, the ABA's comment genuflects toward pluralism among the states and toward comity between the states and the federal government:

> If the Rules of Professional Conduct in . . . two jurisdictions differ, principles of conflict of laws may apply. . . . [T]he general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

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[5] *See, e.g.*, C. Wolfram, Modern Legal Ethics (1986); ABA/BNA Lawyers' Manual on Professional Conduct (1984 and supplements) [hereinafter Lawyers' Manual]. The structure of the Rules also has proven beneficial in a practical sense. In Idaho and Nevada—two states with which the author is personally familiar—disciplinary bar counsel found the organization of the ABA's new Rules so plainly superior to the Code that they regularly employed the Rules as a research aid even before the Rules were substantively adopted.

[6] Schwartz, *The Death and Regeneration of Ethics*, 1980 Am. B. Found. Res. J. 953, 953–54 (1980).

[7] Criteria governing practice in civilian courts are set forth in Dep't of Army, Reg. No. 27-3, Legal Services—Legal Assistance, paras. 2-5 and 2-6 (1 Mar. 1984).

[8] The comments to the Rule advise that state or federal ethical rules will be followed when lawyers are practicing in state or federal civilian courts *during these civilian court proceedings.*

The ABA Rule and its comment invite criticism for begging the question of how a lawyer should proceed when faced with inconsistent standards. The ABA's invocation of "principles of conflict of laws" simply tells the lawyer that he or she must guess which of the jurisdictional authorities has the most significant relationship to the lawyer and his or her conduct.[9] The military rule and its comment seemingly avoid such uncertainty by propounding a bright line requirement: never stray from the military standard.

The sharp clarity of the military approach is intuitively appealing. A tension may exist, however, between proclaiming, on one hand, that military standards of conduct prevail over conflicting state standards, but, on the other hand, making possession of a valid state license a requirement to become a judge advocate or to represent clients before military tribunals. Suppose a lawyer represents a soldier before a court-martial located in the lawyer's state of licensure. During the representation, the lawyer performs an act mandated by military standards but prohibited by state standards. The allegedly aggrieved client files a complaint with the state's disciplinary authority, claiming that a condition of the lawyer's license has been violated. Will the state investigate? If so, is the security afforded by the clear language of military Rule 8.5 simply an illusion?

A state might decline to investigate if it is persuaded that the lawyer's conduct, having been authorized by a federal regulation, is insulated from state intrusion by the preemption doctrine. The United States Supreme Court has held, in *Capital Cities Cable, Inc. v. Crisp*,[10] that the preemption doctrine applies to federal regulations as well as to federal statutes. The doctrine logically cannot apply with *greater* force to regulations than to statutes, however, Preemptive force is not ascribed to statutes unless Congress specifically expresses its intent to displace state law or congress legislates so pervasively in the subject area that its intent to occupy the entire field is manifest.[11]

Can it fairly be said that Congress has evinced an intent to displace, or an intent that The Judge Advocates General displace, the states' traditional power to license lawyers—particularly those who eventually choose to practice in the military or before military tribunals? Are The Judge Advocates General acting as though they have been so charged? The answers to these questions are unclear. Indeed, the entire issue of federal administrative regulation of lawyer conduct has sparked widespread controversy.[12]

As a practical matter, it is unlikely that a state would challenge the power of a uniformed service to prescribe and enforce standards relating solely to representation of soldiers by service-employed (albeit state-licensed) lawyers in matters before military tribunals. Neither is a state likely to concern itself with practice outside the state that complies with rules of the foreign jurisdiction.[13] The state may resist, however, if the uniformed service seek broadly to displace the state's standards governing all aspects of an attorney-client relationship in that state between a civilian attorney and a soldier whom he or she represents before a military tribunal, or the relationship in that state between a service-employed lawyer and a soldier whom he or she represents in a civilian court.

Nevertheless, on a case-by-case basis, the state might be persuaded to defer to a military standard of conduct for another reason. Applying the "conflict of laws" approach embodied in the ABA Model Rule, the state might conclude that the military had a more significant relationship with the lawyer and with the conduct in question. The state could reach this conclusion in light of important policies underlying the military standards and the desirability of maximizing the predictability of rules that govern military lawyers' conduct. Moreover, state disciplinary authorities, who are typically understaffed and overworked, might be reluctant to accept the burden of a case colored by the prospect of litigation with a federal agency over a threshold question of jurisdiction.

If a particularly important state policy were at stake, however, a lawyer governed by the military rules would risk an inquiry by state authorities into his or her conduct. The risk would be analogous to the uncertainty the lawyer would have faced if the military had written the ABA's "conflict of laws" approach into Rule 8.5 at the outset. Consequently, the difference between the ABA and military Rules on jurisdiction may be more apparent than real.

Matters of Substance: Confidentiality, Conflicts, and Organizations

If proposed Rule 8.5 were to prove unsuccessful in preventing states from investigating complaints against military lawyers, the differences between state and military standards of conduct could become critically important. Although such differences exist in many substantive areas, no topics affect a lawyer's work more fundamentally than confidentiality, conflicts of interest, and the needs of organizational clients.

Confidentiality

At common law, as well as by statute and court rule, communications between lawyer and client have been treated as privileged.[14] From this evidentiary doctrine has grown a corollary that the lawyer, as the client's representative, is required to maintain the confidentiality of all communications, disclosing only what the client expressly or impliedly authorizes. As an officer of the legal system and as a public citizen, however, the lawyer arguably has a separate duty to prevent perjury, fraud, or other harm to society.

Three broad approaches to the choice of values between client confidentiality and third-party and other social interests are discernible. First, confidentiality

[9] The "most significant relationship" test is articulated and explained in the Restatement (Second) of the Conflict of Laws (1969).

[10] 467 U.S.C. 691 (1984).

[11] Michigan Canners v. Agricultural Board, 467 U.S. 461 (1984); Florida Lime & Avocado Growers, Inc. v. Paul 373 U.S. 132 (1963).

[12] *See generally* C. Wolfram, *supra* note 5, at 143–44.

[13] *See, e.g.*, Maryland State Bar Ass'n Comm. on Ethics, Opinion No. 86–28, *reported in* Lawyers' Manual, *supra* note 5, at 1122–23 (1986 Supp.). The Committee declared that conduct in another jurisdiction by a Maryland-licensed attorney, consistent with standards of that jurisdiction although inconsistent with those of Maryland, raised no ethical issue in Maryland.

[14] A typical formulation of the attorney-client privilege is found in 8 J. Wigmore, Evidence § 2292, at 554 (J. McNaughton rev. ed. 1961).

could be raised from doctrine to overriding principle, such that a lawyer would always be required to protect a client's interests regardless of impacts on third parties. That would treat the values of confidentiality and the adversary system as absolutes and would require defense of the implied proposition that their social or other values are uniformly superior to those of competing interests and proposed resolutions. Second, and conversely, third-party and other social interests could be made predominant, so that interests of client confidentiality and loyalty would have to yield uniformly in instances of client wrongdoing. A third, much more complex approach would be to develop criteria or categories that attempt to differentiate instances in which either client interests or public interests are to be given preference. To a large extent, the variegated treatment of disclosure problems in the 1969 Code and the 1983 Model Rules reflects such a sophisticated approach. [15]

What does "variegated treatment" mean in the real world? Suppose a client insists on committing perjury, undertakes a fraud, or threatens physical harm to someone else. What should the lawyer do? As to perjury or fraud, the existing Code has furnished little help. DR 7–102(A) states that the lawyer shall not "knowingly use perjured testimony or false evidence." the same DR further states that a lawyer shall reveal a "perpetrated" fraud (saying nothing about a contemplated future fraud). Unfortunately, what little guidance DR 7–102(A) gives, DRs 4–101(B) and (C) may take away. They provide that a lawyer's right to make corrective disclosures does not extend to "confidences" of the client. "Confidences," as opposed to "secrets," are broadly defined as all communications protected by the lawyer-client privilege. As to other kinds of harm, DR 4–101(C)(3) states that a lawyer "may" reveal the client's intent "to commit a crime, and the information necessary to prevent the crime." This disclosure apparently is not subject to the "confidences" exception of DR's 4–101(B) and (C).

The Code has been criticized for ambiguities lurking in the terms "confidences" and "crimes," and for prohibiting the use of perjury without taking account of how difficult it is to ascertain whether proffered testimony is false. To achieve greater clarity, the new ABA Model Rules abolish any distinction between "confidences" and other communications. Broadly speaking, Rule 1.6 protects from disclosure *any* information relating to the lawyer's representation of the client, except as the client may authorize. Rule 3.3 qualifies this sweeping proposition by providing that a lawyer "shall" refuse to offer evidence he or she "knows" to be false and that the lawyer "may" refuse to offer evidence he or she "reasonably believes" to be false. Rule 1.6 contains a further exception. The lawyer "may" reveal information to prevent the client from committing "a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." The Model Rules contain no exception for fraud or nonphysical harm; consequently, such disclosure without the client's consent is prohibited.

Although the ABA Model Rules may be clearer than the Code, not everyone has agreed with the clarification. The provision in Rule 3.3 concerning false evidence has been criticized on one hand as going too far, and on the other as not going far enough, in preventing perjury. The United States Supreme Court may have muted some criticism about going too far in *Nix v. Whiteside.* [16] The Court there held that a criminal defendant's right to effective assistance of counsel did not oblige the lawyer to cooperate in presenting perjured testimony. Thus any concern that Rules 1.6 and 3.3 would conflict with a constitutional right in criminal cases seems to have been alleviated.

The subjects of fraud and other harm have generated louder debate. In 1980, the Kutak Commission's "discussion draft" would have *required* disclosure to prevent criminal acts likely to result in death or serious physical harm, and would have *allowed* disclosure to prevent fraud or other nonphysical harm. In 1981, the "tentative draft" was watered down to provide that both kinds of disclosure would be merely *allowed.* Nevertheless, some national organizations of general practitioners and trial lawyers were dissatisfied. They felt that even the 1981 version encroached too far upon client confidentiality. They urged that disclosures relating to death or serious physical harm merely should be *allowed* and that disclosures of fraud and criminal acts against property or financial interests should be *prohibited.* After a close and sharply divided vote, the ABA House of Delegates ultimately adopted this position. The language of Model Rule 1.6 reflects the outcome.

Many states have disagreed. Even among jurisdictions that have adopted the ABA Rules in substance, several have departed from Rule 1.6 by mandating disclosure of threatened death or serious physical harm, or by permitting disclosure of fraud or other kinds of nonphysical harm. [17]

Drafters of the proposed military Rules have charted their own path away from Model Rule 1.6. The military version of the rule echoes the 1980 Kutak draft by *requiring* disclosure of client information "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." This mandatory duty also extends to information concerning a "significant and imminent impairment of national security or to the readiness or capability of a military unit, vessel, aircraft, or weapon system." Like its ABA counterpart, military Rule 1.6 contains no authorization, mandatory or permissive, to reveal a fraud or other kinds of nonphysical harm. [18]

The military and ABA versions of Rules 1.6 undertake to balance the value of free and protected communication between lawyer and client against the social cost of

[15] C. Wolfram, *supra* note 5, at 665–66.

[16] 106 S. Ct. 988 (1986).

[17] Summaries of state action on the ABA Rules are contained in the Lawyers' Manual, *supra* note 5.

[18] In both the ABA and the military versions, Rule 3.3 carves out a narrow exception to the general prohibition against disclosing a fraud. Rule 3.3 provides, in part, that a lawyer "shall not knowingly . . . fail to disclose a material fact *to a tribunal* when disclosure is necessary to avoid assisting a . . . fraudulent act by the client." (Emphasis added.) On a related point, Rule 1.2(d) provides that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is . . . fraudulent."

nondisclosure where harm ultimately occurs. This balancing approach presents two problems for the military lawyer. First, the military Rules may strike one balance while state standards may strike another—or several others. Suppose a legal assistance officer representing a soldier discovers that the client has perpetrated a fraud upon a third party. If the state's standards follow the existing Code, or if the state has adopted the ABA Rules with a modification permitting disclosure of fraud, then the lawyer could make a disclosure and take remedial action. But the lawyer could not do so under the proposed military Rule. As the lawyer attempts to reconcile this conflict, he or she will find that his or her conduct is dictated by the least flexible standard. Because the proposed military Rule is rigid—mandating some disclosure, prohibiting others, and leaving nothing to discretion—it invariably will prevail over any state standard merely permitting disclosure. Permissive rules are offended neither by disclosure nor by nondisclosure. They yield to the force of mandates and prohibitions. Thus, in the example, given, the military Rule will prevail and the lawyer will choose not to disclose the perpetrated fraud.

Although some lawyers may chafe at this result, at least the problem of choice is clearly resolved. A second, more vexing problem may be harbored by the military Rule itself. When is an act "likely to result in imminent death or substantial bodily harm"? Just what is a "significant and imminent impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system"? Differing interpretations of these phrases would evoke little concern if disclosures were merely permissive. But under the military Rule, disclosures are either mandatory or prohibited. The interpretation controls the outcome.

Consequently, military lawyers in the future may find it necessary to decide whether a soldier's expressed desire to "get even" with his estranged spouse is a threat to do "substantial bodily harm." Or a soldier with a highly specialized, weapons-related military occupational specialty may tell his lawyer that he will be temporarily absent without leave in order to resolve a personal problem. Does this information relate to a "significant and imminent impairment of national security or the readiness or capability of a . . . weapons system"? The comments to the proposed military Rule contain no illustrative fact patterns or other specific guidance to help resolve such questions.

This does not mean that mandatory disclosure was mistakenly written into the military version of Rule 1.6. Required disclosure may represent an appropriate weighing of the value of confidentiality against the unique risks of harm found in a military environment. The Rule and its present comment, however, will subject military lawyers to determinations after the fact concerning the propriety of their conduct. That, ironically, is one of the evils that led to disaffection with the existing Code.

Conflicts and imputed disqualification

Rules prohibiting conflicts of interest arise from two fundamental principles in lawyer-client relationships: confidentiality and loyalty. The Code currently provides, in DRs 5–101(A) and 5–105(C), that a lawyer shall not accept employment if the exercise of his other professional judgment on behalf of the client is reasonably likely to be adversely affected by the differing interests of other clients or by the lawyer's own personal interests—*unless* the client consents after full disclosure. The ABA's Model Rule 1.7 strengthens the safeguard against conflicting interests by requiring that the client give consent after full disclosure *and* that the lawyer "reasonably" believe the client's interests will not be adversely affected. The proposed military Rule is the same. In one important application of the safeguard against conflicts, however, the ABA and the military diverge. That area is imputed disqualification.

> Lawyers practicing together are in a poor position to give the world assurance that one lawyer is not for many purposes the alter ego of the other. Ties of friendship and finance and ready access to each other's files unite their efforts and interests. . . . In recognition of such realities, common law doctrine and professional codes have developed rules that impute to associated lawyers the conflict of interest disabilities of each other. In general, if a lawyer is disabled by a conflict, his or her partners and associates are similarly disabled. Yet, once under way, an "imputed disqualification" rule can gather relentless momentum and be given senseless applications. Courts accordingly have been alert to confine the operation of the imputed-disqualification doctrine to situations that are likely to present substantial risks that the principles of confidentiality and loyalty will be seriously impaired. [19]

Notwithstanding this admonition, the ABA's Model Rule 1.10 flatly provides that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [rules relating to general conflict of interest, prohibited transactions, former clients or functioning as an intermediary]."

This language embodies a judgment that conflicts of interest cannot be avoided realistically by anything less than a blanket rule of imputed disqualification.

In contrast, proposed military Rule 1.10 states that "[l]awyers working in the same military law office are not automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so." The comment accompanying the military Rule elaborates:

> The principle of imputed disqualification is not automatically controlling for judge advocates. The knowledge, actions, and conflicts of interest of one lawyer are not to be imputed to another simply because they operate from the same office. . . . Whether a lawyer is disqualified requires a functional analysis of the facts in a specific situation. The following considerations are involved: preserving confidentiality, maintaining independence of judgment, and avoiding positions adverse to a client. . . . It is recognized that the circumstances of military service may require representation of opposing sides by military lawyers from the same office. Such representation is permissible so long as conflicts of interest are avoided and independent judgment, zealous representation, and protection of confidences are not compromised.

[19] C. Wolfram, *supra* note 5, at 391.

The military Rule embodies a pragmatic compromise. Recognizing that lawyers' services are finite resources, the Rule eschews the ABA's emphasis upon outward assurances of loyalty and confidentiality in favor of specific determinations as to whether infringements upon loyalty or confidentiality actually exist. Because the information necessary to make such determinations ordinarily is available only to the lawyer, the client has a scant basis to question the lawyer's decision.

The rationale underlying the military Rule and its comment plainly suits the limited capabilities of many staff judge advocate (SJA) and legal assistance offices, particularly those at small installations and overseas sites. But it is less clear that the rationale fits a soldier's relationship with a Reserve Component lawyer providing extended legal assistance, or with a civilian lawyer representing the soldier before a military tribunal. The law practices of these attorneys are not finite government resources in the same sense as SJA and legal assistance offices. There may be no pragmatic need to provide the soldier clients of these lawyers any less assurance of loyalty and confidentiality than their civilian clients would receive.

The uncertain status of Reservists and civilian lawyers under proposed Rule 1.10 could lead to imposition of differing demands by the military and by the states. In such event, as we have seen in the foregoing discussion of confidentiality, the lawyer will find his or her conduct dictated by the least flexible rule. In cases of imputed disqualification, however—unlike cases involving disclosure of confidential information—the states rather than the military are likely to possess the dominant standard. The Code and the Model Rule mandate disqualification when an affiliated lawyer is impaired by a conflict. The military Rule neither mandates nor prohibits disqualification; it is not necessarily offended by a decision in a particular case to refuse employment by the client. Accordingly, Reservists and civilian attorneys seeking to satisfy both state and military standards may find it expedient to adhere to the imputed disqualification doctrine as though it had been preserved in the military Rule.

The Organizational Client

The paradigm lawyer-client relationship exists between two individuals. The face of law practice is changing rapidly, however. A recent survey has indicated that approximately two-thirds of all lawyers work within organizations of some sort, and perform the bulk of their services for entities rather than individuals.[20]

> In a substantial amount of legal practice, "the client" is not the "person with a problem" traditionally depicted in legal literature, but an organization with indeterminate or potentially conflicted interests. So too, the attorney often is not an independent moral agent but an employee with circumscribed responsibility, organizational loyalty, and attenuated client contact.[21]

The existing Code does not contain, in its DRs, a standard governing the conduct of a lawyer toward an organizational client. Ethical Consideration 5–18, however, states that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a . . . person connected with the entity." The ABA's new Model Rule 1.13 explicitly deals with organizational clients, reemphasizing the basic precept that the lawyer's client is the entity itself.

The critical question faced by lawyers representing entities is what to do if a person in authority within the organization acts, or intends to act, contrary to the organization's legal interests. Model Rule 1.13 provides no discrete answer. It offers guidelines, some of which narrow the lawyer's ethical responsibility. The lawyer need be concerned with the aberrant individual's conduct only if it relates to the subject matter of the lawyer's representation of the entity. Moreover, the lawyer must determine whether the individual's conduct is "a violation of a legal obligation to the organization, or a violation of law which reasonably might to imputed to the organization, *and is likely to result in substantial injury to the organization.*"[22]

If these tests are satisfied, then the lawyer must "proceed as is reasonably necessary in the best interest of the organization." The remedial measures a lawyer may undertake include requesting the individual to reconsider his or her conduct; advising the individual to seek another legal opinion; referring the matter to "higher authority" in the organization; and, as a last resort, terminating the lawyer-client relationship with the organization. Prominently omitted from the laundry list of permissible remedies is "whistle-blowing"—disclosure of information to outside parties in order to prevent the individual from harming the organization. Authority to blow the whistle was contained in the Kutak Committee's 1980, 1981 and 1982 drafts, but it was excised, and the lawyer's option to resign was inserted, by the ABA's House of Delegates.

The proposed military version of Rule 1.13 also discourages "whistle-blowing" by impliedly prohibiting disclosures to persons outside the uniformed service unless authorized by Rule 1.6. The military Rule retains many of the ABA's guidelines narrowing the circumstances in which the lawyer must be concerned with individual misconduct, and it lists the remedial measures available. Among these measures is the option to refer the matter to higher authorities in the Army. Military lawyers are encouraged to voice their concerns through supervisory judge advocate channels rather than directly employing the non-legal chain of command to resolve the perceived problem. The proposed military rule also expressly recognizes the lawyer's alternative of terminating the representation. The military rule is essentially coextensive with the ABA version.

Rule 1.13 represents a fragile consensus on minimum standards in a rapidly evolving area of professional responsibility. If the Rule seems more precatory than prescriptive, it illustrates the difficulty of distilling specific standards of conduct from general principles. As the early Canons, the present Code, and the new Rules show, this is the never-ending but ennobling task of a profession that takes ethics seriously and tries to bring its behavior closer to its aspirations.

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[20] B. Curran, The Legal Professions of the 1980s: Selected Statistics From the 1984 Lawyer Statistical Report (1984).

[21] Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 590 (1985).

[22] Model Rules of Professional Conduct Rule 1.13 (Discussion Draft 1983) (emphasis added).

Legislative Protection Against Legal Malpractice Actions

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The spectre of personal malpractice liability, long a source of special concern for active and Reserve Component legal assistance officers,[1] has been largely eliminated by the passage of section 1356 of the 1987 Department of Defense Authorization Act.[2] That statute provides all attorneys and legal staff members within the Department of Defense (DOD) with personal malpractice protection similar to that which medical care providers have long enjoyed under the Gonzales Act.[3]

Although section 1356 embodies a proposal long favored by the military legal community, it was introduced in Congress as a floor amendment and passed without benefit of hearings or debate in either the House or the Senate. The absence of legislative history precludes a definitive answer to many of the questions raised by this statute. Nevertheless, all military attorneys should be aware of the law's provisions and some of the issues that may arise under it. This article briefly describes the major features of section 1356, outlines the procedures to be followed in the event of a legal malpractice suit, and notes some actions that legal service providers and managers can take to assist in the defense of claims brought under this legislation.

The Scope of Section 1356 Protection

Section 1356(a) sets forth the substance of the protection to be afforded legal service providers.

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for injury or loss of property caused by the negligent or wrongful act or omission of any person who is an attorney, paralegal, or other member of a legal staff within the Department of Defense (including the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32), in connection with providing legal services while acting within the scope of the person's duties or employment, is exclusive of any other civil action or proceeding by reason of the same subject matter against the person (or the estate of the person) whose act or omission gave rise to such action or proceeding.

Like the Gonzalez Act, section 1356 effectively immunizes DOD legal service providers from personal liability by making an action against the United States under the Federal Tort Claims Act (FTCA)[4] the exclusive remedy available for legal malpractice. The statute specifically protects any person who is an "attorney, paralegal, or other member of a legal staff." This language is deliberately general and should extend to both assigned and detailed administrative support personnel assisting in providing legal services under the supervision of a DOD attorney.[5] Similarly, the extension of protection to all acts performed "in connection with providing legal services within the scope of the person's duties or employment" would include even the most basic clerical tasks, such as mailing documents.[6]

National Guard personnel are clearly covered while engaged in federal duty or training, and Army Reservists, while not specifically mentioned in section 1356, are covered because of their status as federal employees under the FTCA when performing reserve duty. The provision of legal services by National Guard personnel in connection with a call to state active duty for disaster relief, riot control, or other purposes not within the enumerated sections of title 32 would not be covered, however. Whether Army Reserve personnel would be covered for actions taken outside periods of annual training, active duty for training, or inactive duty training is uncertain.

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[1] Providers of command legal services, though certainly subject to pertinent provisions of the Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (1982) (failure to obey lawful general order or regulation, other lawful order, or dereliction of duty), are almost surely insulated from personal tort liability in all but the most extreme cases by executive immunity. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982) (qualified immunity); Stump v. Sparkman, 435 U.S. 349 (1978) (absolute judicial immunity); Imbler v. Pachtman, 424 U.S. 409 (1975) (absolute prosecutorial immunity). It has generally been assumed, but never decided, that intramilitary tort immunity would bar claims involving trial or appellate defense services or legal assistance services provided to service members. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296 (1983). *But see* Atkinson v. United States, 804 F.2d 561 (9th Cir. 1986) (medical malpractice claim not barred by doctrine of United States v. Feres, 340 U.S. 135 (1950), because Supreme Court has redefined it solely in terms of impact on military discipline, which is not affected by such a claim). Finally, it is doubtful whether provision of legal assistance services to family members, or to service members in circumstances where a family member or other nonservice member might have an independent third-party claim, is subject to any form of nonstatutory immunity.

[2] To be codified at 10 U.S.C. § 1054.

[3] 10 U.S.C. § 1089 (1982). *See also* the Drivers' Act, 28 U.S.C. § 2679(b) (1982).

[4] 28 U.S.C. §§ 1346(b); 2671–2680 (1982).

[5] The law of the place where the wrongful conduct took place controls the scope-of-employment issue. Williams v. United States, 350 U.S. 857 (1955).

[6] This provision is broader than the nonstatutory absolute immunity generally extended federal officials for common law torts under Barr v. Matteo, 360 U.S. 564 (1959). A number of courts have limited *Barr* immunity to cases involving the exercise of discretion, as opposed to purely "ministerial" actions. *See, e.g.*, Adden v. Middlebrooks, 688 F.2d 1147, 1152 (7th Cir. 1982); Davis v. Knud-Hansen Memorial Hospital, 635 F.2d 179, 186 (3d Cir. 1980); Jackson v. Kelley, 557 F.2d 735, 737–39 (10th Cir. 1977) (en banc) (medical judgments nongovernmental and thus outside *Barr* protection); Haas v. United States, 518 F.2d 1138, 1142 (4th Cir. 1975); Carter v. Carlson, 447 F.2d 358, 361 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 613 (1973); Estate of Burks v. Ross, 438 F.2d 230, 234 (6th Cir. 1971).

Procedures for Obtaining Representation

Section 1356(b) assigns responsibility to the Attorney General to defend litigation covered by Section 1356(a). Section 1356(b) further provides:

> Any person against whom such a civil action or proceeding is brought shall deliver . . . all process served upon such person (or an attested true copy thereof) to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers. Such person shall promptly furnish copies of the pleading and process therein—
>
> (1) to the United States Attorney for the district embracing the place wherein the action or proceeding is brought;
>
> (2) to the Attorney General; and
>
> (3) to the head of the agency concerned.

This provision is consistent with the requirements of paragraph 2–3 of Army Regulation 27–40,[7] which generally designates the staff judge advocate or legal adviser of the individual's organization as the person to whom pleadings and process will be referred. The staff judge advocate or legal adviser is then responsible under section 1356 and AR 27–40 for further distribution of the process and pleadings. The staff judge advocate or legal adviser will also notify Litigation Division, inquire into the issue of scope of employment, and take other action as provided in paragraph 2–3*e*(2), AR 27–40.

Upon a certification by the Attorney General that the legal provider was acting within the scope of his or her employment, section 1356(c) provides that the action, if brought in a state court, shall be removed to federal district court, and that there the United States will substitute itself for the individual defendant.

Section 1356 and The Federal Tort Claims Act

Once the case is properly in federal district court and the United States is substituted as a defendant, the substantive and procedural requirements of the FTCA apply. This includes the often overlooked jurisdictional requirement that a timely administrative claim be filed and denied, or lie without action for six months, prior to initiation of suit. Once this jurisdictional prerequisite has been satisfied, state law will determine the standard of care required of government legal service providers.

Section 1356(e) does alter the FTCA's waiver of sovereign immunity in one important particular. It provides that, "[f]or purposes of [Section 1356], the provisions of section 2680(h) of title 28 shall not apply to a cause of action arising out of a negligent or wrongful act or omission in the provision of legal assistances."

Section 2680(h) of title 28, commonly known as the "intentional torts exception" to the FTCA, provides that the FTCA's waiver of sovereign immunity does not extend to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," except in certain cases involving investigative or law enforcement officials. Section 1356(e) waives this exception as to legal malpractice claims within the scope of Section 1356(a).[8] Without such a provision, a plaintiff who preferred to proceed against the individual legal service provider rather than seek the generally deeper pocket of the United States could attempt to avoid section 1356 altogether by framing his or her complaint against the legal service provider in terms of one or more of the torts enumerated in section 2680(h), *i.e.*, misrepresentation, deceit, interference with contract rights, etc. Section 1356(e) prevents such an end run around its provisions, and makes the FTCA the exclusive remedy for all actions which can be characterized as arising out of acts done in providing legal services.

The FTCA does not, however, apply to claims "arising in a foreign country."[9] Claims occurring overseas may be cognizable under the Military Claims Act,[10] but judicial review is not available and an unsatisfied plaintiff may choose to sue the legal provider individually in a state or federal court provided personal jurisdiction can be obtained over the provider.[11] Section 1356(f) provides a measure of protection for legal service providers in this and other circumstances where the FTCA would not authorize suit against the United States as a substituted party. Section 1356(f) authorizes, but does not require, "the Secretary of Defense or the Secretary of a military department" to

> hold harmless or provide liability insurance for any person described in subsection (a) for damages for injury or loss of property caused by such person's negligent or wrongful act or omission in the provision of authorized legal assistance while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with an entity other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

This provision is identical in substance to the Gonzales Act.[12] The Army has provided in Army Regulation 27–20 that a claim arising under 10 U.S.C. § 1089(f) "will be paid" provided the acts giving rise to it otherwise fall within the ambit of the Gonzales Act and the claimant "compl[ies] with the requirements set forth in [AR 27–40] regarding prompt notification and delivery of all process served or received, providing such other documents, information and assistance as requested, and cooperation in the defense of the action on the merits."[13] Army Regulation 27–20 is presently under revision, and it is expected that this indemnification protection will be extended to legal

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[7] Dep't of Army, Reg. No. 27–40, Legal Services—Litigation, para 2–3 (4 Dec. 1985) [hereinafter AR 27–40].

[8] Use of the term "legal assistance" in section 1356(e), rather than the arguably broader phrase "legal services" used elsewhere in section 1356, is merely a drafting error. Section 1356(e) is intended to apply to all claims within the ambit of section 1356(a).

[9] 28 U.S.C. § 2680(k) (1982).

[10] 10 U.S.C. § 2733 (1982).

[11] This is usually accomplished by waiting until the legal service provider returns to the United States.

[12] *See* 10 U.S.C. § 1089(f) (1982).

[13] Dep't of Army, Reg. No. 27–20, Legal Services—Claims, para. 3–4g (18 Sept. 1970) (C17 15 Aug. 1981).

malpractice claims arising under section 1356(f). The statute itself, of course, would provide the necessary authority to pay such a claim prior to promulgation of implementing regulatory authority.

The Impact of Section 1356 on Military Legal Practice[14]

Section 1356 protection for the military practitioner likely carries with it costs as well as benefits. Certainly it should eliminate the concern many active and reserve judge advocates have expressed regarding the possibility of personal liability. Historically, that has been a potential rather than actual problem, probably due to a confluence of several factors. First, the nature and extent of representation in military legal assistance programs is limited, in part to reduce the risks of bad practice. At the same time, the consequences of bad practice in family law and wills and estates, possibly the most risky areas of legal assistance, generally do not have substantial economic consequences because most military clients are of moderate means. Furthermore, unlike bad medical care, the consequences of bad legal service, especially tax consequences, may not even be discernible absent expert analysis. Finally, actions taken in recent years to strengthen the Army Legal Assistance Program have undoubtedly enhanced the general quality of practice. Taken together, these factors suggest that claims for legal malpractice will continue to be rare regardless of the provisions made for their resolution.

On the other hand, the multistate, indeed often international nature of legal assistance practice, the difficulty of providing suitable expertise on state law matters at both the supervisory and action attorney levels, and the often rapid turnover of legal assistance attorneys in the typical judge advocate office create an environment of risk. Furthermore, recent legislative and judicial attacks on the *Feres* doctrine in medical malpractice cases may, if successful, stimulate the willingness of the private bar to challenge *Feres* in an appropriate case involving legal assistance. Such an event could subject Army lawyers to suits brought by military personnel who are presently barred by *Feres* from collecting court ordered damages for negligent acts occurring incident to service.

Section 1356 ties those risk factors to the government's deep pocket in a very public way, and makes access to that deep pocket a matter of state law. It is reasonable, therefore, to expect some rise in the incidence of claims for negligence in the delivery of legal services, whether or not well-founded.

There are a number of actions judge advocates involved in the provision of individual legal services can take to minimize the likelihood of a claim under section 1356 and to lay the groundwork for a successful defense.

1. Ensure that all legal assistance attorneys are familiar with the state law regarding provision of legal services at each installation. Review any existing state bar guidelines or standards, especially those that may address utilization of paralegal and other support staff. Such standards may, if violated, themselves constitute evidence of negligence. Identify local policies and practices that deviate from any such standards, evaluate the risks involved, and take appropriate action.

2. Review legal assistance standard operating procedures to ensure that appropriate defensive counseling is conducted (*e.g.*, that will clients are informed regarding the circumstances that may necessitate a change in the will, the required procedures for effecting such changes, and the need for periodic review of the estate plan). Establish procedures to evidence in the client file that such counseling has occurred.

3. Periodically ensure that all nonattorneys, including unit legal clerks not assigned to the installation legal office, understand and comply with policies regarding their permissible scope of activities. Ensure that both attorneys and nonattorneys adhere to established policies regarding provision of advice over the telephone, and make adequate written notations in client files to evidence the nature and limits of advice given.

4. In the event that duty personnel are "borrowed" to support legal assistance or trial defense operations, obtain a detailing order or other evidence that the personnel are at least temporarily members of the "legal staff."

5. Review all legal assistance operations, especially those conducted by units or augmentees from the reserve components, to ensure that the scope of services provided adheres to Army Regulation 27–3,[15] and that deviations authorized pursuant to its provisions are clearly set forth in writing. Review reserve legal assistance operations to ensure that adequate safeguards exist against conflicts of interest involving civilian representation by Reserve Component attorneys on matters originally arising during the provision of authorized legal assistance.

Conclusion

Section 1356 protection for the individual legal assistance provider in no way lessens the need for effective quality control throughout the Army Legal Assistance Program and in trial and appellate defense operations. Indeed, section 1356 arguably increases the potential for claims based upon errors and omissions in providing individual legal services. Our professionalism as judge advocates and our obligations as public officials counsel us to take effective action now to minimize the incidence and magnitude of meritorious claims under section 1356.

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[14] The comments below deal primarily with legal assistance practices. It is important to note, however, that this statute applies to all DOD legal providers. In particular, a military defense counsel is placed at risk once his or her client's discharge has finally been approved. At that point, the *Feres* bar no longer applies and every subsequent legal action is subject to scrutiny in a federal court as part of an FTCA malpractice suit. Fortunately, section 1356 now provides liability protection for Trial Defense Service personnel.

[15] Dep't of Army, Reg. No. 27–3, Legal Services—Legal Assistance (1 Mar. 1984).

Military Justice Amendments of 1986

The Military Justice Amendments of 1986 were part of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. ___ (1986). The Authorization Act was signed by the President on November 14, 1986. The amendments are reprinted in their entirety.

Title VIII—Uniform Code of Military Justice

Sec. 801. Short Title; References to Uniform Code of Military Justice

(a) SHORT TITLE.—This title may be cited as the "Military Justice Amendments of 1986."

(b) REFERENCES TO UCMJ.—Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

Sec. 802. Defense of Lack of Mental Responsibility

(a) IN GENERAL.—(1) Subchapter VII is amended by inserting after section 850 (article 50) the following new section (article):

"§ 850a. Art. 50a. Defense of lack of mental responsibility

"(a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

"(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

"(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge, or the president of a court-martial without a military judge, shall instruct the members of the court as to the defense of lack of mental responsibility under this section and charge them to find the accused—

"(1) guilty;

"(2) not guilty; or

"(3) not guilty only by reason of lack of mental responsibility.

"(d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall find the accused—

"(1) guilty;

"(2) not guilty; or

"(3) not guilty only by reason of lack of mental responsibility.

"(e) Notwithstanding the provisions of section 852 of this title (article 52), the accused shall be found not guilty only by reason of lack of mental responsibility if—

"(1) a majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established; or

"(2) in the case of a court-martial composed of a military judge only, the military judge determines that the defense of lack of mental responsibility has been established.".

(2) The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 850 (article 50) the following new item:

"850a. 50a. Defense of lack of mental responsibility.".

(b) EFFECTIVE DATE.—Section 850a of title 10, United States Code, as added by subsection (a)(1), shall apply only to offenses committed on or after the date of the enactment of this Act.

Sec. 803. Application for Enlisted Members to Serve on Court-Martial

(a) IN GENERAL.—Section 825(c)(1) (article 25(c)(1)) is amended by striking out "has requested in writing" and inserting in lieu thereof "has requested orally on the record or in writing".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply only to a case in which arraignment is completed on or after the effective date of this title.

Sec. 804. Court-Martial Jurisdiction Over Reserve Members

(a) JURISDICTION OVER RESERVE MEMBERS UNDER CERTAIN CIRCUMSTANCES.—(1) Paragraph (3) of section 802(a) (article 2(a)) is amended to read as follows:

"(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.".

(2) Section 802 (article 2) is further amended by adding at the end the following new subsection:

"(d)(1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of—

"(A) investigation under section 832 of this title (article 32);

"(B) trial by court-martial; or

"(C) nonjudicial punishment under section 815 of this title (article 15).

"(2) A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was—

"(A) on active duty; or

"(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

"(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

"(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

"(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not—

"(A) be sentenced to confinement; or

"(B) be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than duty ordered under paragraph (1)).".

(b) CONTINUED AMENABILITY TO JURISDICTION.—Section 803 (article 3) is amended by adding at the end the following new subsection:

"(d) A member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to the jurisdiction of this chapter for an offense against this chapter committed during such period of active duty or inactive-duty training.".

(c) AUTHORITY TO ADMINISTER OATHS.—Section 936 (article 136) is amended by inserting "or performing inactive-duty training" in subsections (a) and (b) after "active duty".

(d) ARTICLES TO BE EXPLAINED.—The text of section 937 (article 137) is amended to read as follows:

"(a)(1) The sections of this title (articles of the Uniform Code of Military Justice) specified in paragraph (3) shall be carefully explained to each enlisted member at the time of (or within six days after)—

"(A) the member's initial entrance on active duty; or

"(B) the member's initial entrance into a duty status with a reserve component.

"(2) Such sections (articles) shall be explained again—

"(A) After the member has completed six months of active duty or, in the case of a member of a reserve component, after the member has completed basic or recruit training; and

"(B) at the time when the member reenlists.

"(3) This subsection applies with respect to sections 802, 803, 807–815, 825, 827, 831, 837, 838, 855, 877–934, and 937–939 of this title (articles 2, 3, 7–15, 25, 27, 31, 37, 38, 55, 77–134, and 137–139).

"(b) The text of the Uniform Code of Military Justice and of the regulations prescribed by the President under such Code shall be made available to a member on active duty or to a member of a reserve component, upon request by the member, for the member's personal examination.".

(e) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) shall apply only to an offense committed on or after the effective date of this title.

Sec. 805. Statute of Limitations

(a) REVISION OF STATUTES OF LIMITATION.—Subsections (a), (b), and (c) of section 843 (article 43) are amended to read as follows:

"(a) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.

"(b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

"(2) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.

"(c) Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this section (article).".

(b) TIME FOR REINSTATEMENT OF CHARGES.—Such section is further amended by adding at the end the following new subsection:

"(g)(1) If charges or specifications are dismissed as defective or insufficient for any cause and the period prescribed by the applicable statute of limitations—

"(A) has expired; or

"(B) will expire within 180 days after the date of dismissal of the charges and specifications,

trial and punishment under new charges and specifications are not barred by the statute of limitations if the conditions specified in paragraph (2) are met.

"(2) The conditions referred to in paragraph (1) are that the new charges and specifications must—

"(A) be received by an officer exercising summary court-martial jurisdiction over the command within 180 days after the dismissal of the charges or specifications; and

"(B) allege the same acts or omissions that were alleged in the dismissed charges or specifications (or alleged acts or omissions that were included in the dismissed charges or specifications).".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to an offense committed on or after the date of the enactment of this Act.

Sec. 806. Time for Defense Post-Trial Submissions

(a) SIMPLIFICATION OF TIME FOR SUBMISSION.—Subsection (b) of section 860 (article 60) is amended—

(1) by striking out paragraph (3);

(2) by redesignating paragraph (2) as paragraph (3) and inserting a comma in that paragraph after "case"; and

(3) by striking out paragraph (1) and inserting in lieu thereof the following:

"(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. Except in a summary court-martial case, such a submission shall be made within 10 days after the accused has been given an authenticated record of trial and, if applicable, the recommendation of the staff judge advocate or legal officer under subsection (d). In a summary court-martial case, such a submission shall be made within seven days after the sentence is announced.

"(2) If the accused shows that additional time is required for the accused to submit such matters, the convening authority or other person taking action under this section, for good cause, may extend the applicable period under paragraph (1) for not more than an additional 20 days.".

(b) RECOMMENDATIONS OF STAFF JUDGE ADVOCATE.—Subsection (c)(2) of such section is amended by striking out "and, if applicable, under subsection (d).".

(c) CONFORMING AMENDMENTS.—Subsection (d) of such section is amended—

(1) in the third sentence, by striking out "who shall have five days from the date of receipt in which to submit any matter in response" and inserting in lieu thereof "who may submit any matter in response under subsection (b)"; and

(2) by striking out the fourth sentence.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply in cases in which the sentence is adjudged on or after the effective date of this title.

Sec. 807. Detail of Judge Advocates

(a) REPRESENTATION OF UNITED STATES INTERESTS.—Section 806 (article 6) is amended by adding at the end the following subsection:

"(d)(1) A judge advocate who is assigned or detailed to perform the functions of a civil office in the Government of the United States under section 973(b)(2)(B) of this title may perform such duties as may be requested by the agency concerned, including representation of the United States in civil and criminal cases.

"(2) The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations providing that reimbursement may be a condition of assistance by judge advocates assigned or detailed under section 973(b)(2)(B) of this title.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a)—

(1) shall take effect on the date of the enactment of this Act; and

(2) may not be construed to invalidate an action taken by a judge advocate, pursuant to an assignment or detail under section 973(b)(2)(B) of title 10, United States Code, before the date of the enactment of this Act.

Sec. 808. Effective Date

Except as provided in sections 802(b), 805(c), and 807(b), this title and the amendments made by this title shall take effect on the earlier of—

(1) the last day of the 120-day period beginning on the date of the enactment of this Act; or

(2) the date specified in an Executive order for such amendments to take effect.

USALSA Report

Trial Counsel Forum

Trial Counsel Assistance Program

Military Rule of Evidence 608(b) and Contradictory Evidence: The Truth-Seeking Process

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Trial Counsel Assistance Program

Introduction

The credibility of a witness, including the accused, is always an issue;[1] in many cases, it is the only issue, especially where the only testimony at trial is that of the victim and the accused. Because of this, parties have the right to impeach a witness by testing his or her credibility. Failure to allow an accused to impeach a witness against him or her

[1] United States v. Tomchek, 4 M.J. 66, 71 (C.M.A. 1977); United States v. Ryan, 21 M.J. 626 (A.C.M.R. 1985).

with credible evidence denies the constitutional right of confrontation under the sixth amendment.[2]

Impeaching a witness is one of the most challenging aspects of trial work, especially for the prosecutor. Exposing bias, inaccuracy, unreliability, or untruthfulness in a witness' testimony, particularly that of an accused, serves the government's overall objective in the truth-seeking process. The primary purpose of this article is to contrast two often confused methods of impeaching a witness. The first, an attack on cross-examination of a witness' general character for truthfulness or untruthfulness or the general character for truthfulness or untruthfulness of another witness as to whose character the witness being cross-examined has testified by inquiring into specific instances of conduct under Military Rule of Evidence 608(b). The second, impeachment of a witness by using extrinsic evidence that contradicts the witness' testimony. The article will alert counsel to the peculiarities in employing these two methods of impeachment and will discuss the seemingly perplexing results of the strict application of Mil. R. Evid. 608(b), which limits counsel's ability to expose false testimony with extrinsic evidence.

Evidence of Specific Instances of Conduct Attacking Character for Truthfulness Under Mil. R. Evid. 608

Military Rule of Evidence 608 addresses when and how specific instances of conduct may be used to attack or support the credibility of a witness. Rule 608(b) provides:

> *Specific instances of conduct.* Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Mil. R. Evid 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

The "specific instances" referred to in Rule 608(b) must be probative of the witness' truthfulness. Of course, not all wrongs reflect adversely on truthfulness. The acts contemplated by Rule 608(b) are instances which relate to *crimen falsi*, such as perjury, fraud, false swearing and forgery.[3] The fact that a particular act may be illegal does not necessarily make the commission of the act an indicator of the actor's character for untruthfulness. For instance, involvement in a drug transaction does not necessarily reflect on the offender's truthfulness or untruthfulness.[4] Thus, only acts committed by a witness that reflect directly on his or her character for truthfulness are a proper subject for inquiry under Rule 608(b). Even then, it is within the discretion of the military judge to determine whether counsel may question the witness regarding the deceitful act. The military judge is bound by Mil. R. Evid. 403, which precludes admission of relevant evidence that is unfairly prejudicial.[5] When making these decisions, however, the military judge has wide discretion when balancing the probative and prejudicial nature of impeachment evidence.[6]

A classic example of the use of Rule 608(b) occurred in *United States v. Owens.*[7] Owens was charged with wrongfully possessing a firearm and intentionally murdering his wife. Mrs. Owens was killed by a single gunshot wound she received while she was driving the couple's Volkswagen down the street from their quarters shortly before midnight. The fatal shot came from a rifle with a telescopic sight that was fired by the accused from the couple's house. Mrs. Owens left the apartment after a domestic quarrel. At trial, Owens, an experienced hunter and marksman, claimed that the shooting was a tragic accident. He testified that, while outside his house, he chambered a round and pulled the trigger to clear the weapon. Only Owens' testimony suggested that the killing might have been an accident.

The trial judge recognized that Owens' credibility was in issue and allowed trial counsel, under Mil. R. Evid. 608(b), to cross-examine Owens about omissions he had made in his application for appointment as a warrant officer. In response to questions on the application, Owens had falsely omitted convictions for possession of marijuana and unlawfully carrying a firearm and an arrest for assaulting his ex-wife.

Owens initially denied that he had made these omissions. He later admitted having the two convictions, but claimed the omissions on his warrant officer application were innocent and unintentional.[8] Other than Owens' admissions, trial counsel presented no evidence concerning the falsifications. The Court of Military Appeals ruled that the trial judge did not abuse his discretion under Mil. R. Evid. 403 by allowing the cross-examination. Owens' omissions were probative of his credibility. The government was therefore authorized under Rule 608(b) to impeach Owens on cross-examination by inquiring into "a prior act of intentional falsehood under oath."[9] On appeal, Owens had complained that his convictions and arrest were inadmissible and counsel should not have been allowed to ask about these prior acts of misconduct. The court made it clear, however, that

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[2] United States v. Cantu, 22 M.J. 819, 824 (N.M.C.M.R. 1986).

[3] United States v. Leake, 642 F.2d 715, 718 (4th Cir. 1981).

[4] United States v. Fortes, 619 F.2d 108, 118 (1st Cir. 1980).

[5] Military Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[6] United States v. Harvey, 12 M.J. 501, 502, (A.F.C.M.R. 1981), *aff'd*, 14 M.J. 129 (C.M.A. 1982).

[7] 21 M.J. 117 (C.M.A 1985).

[8] The convictions were not admissible under Mil. R. Evid. 609 because they did not meet the general requirements of that rule.

[9] 21 M.J. at 123.

it was the act of deceit in omitting the convictions and arrest, as opposed to the acts themselves, that was relevant under Mil. R. Evid. 608(b):

> Since the prior convictions and arrests were the matters omitted in his answers, they were necessary and inseparable parts of this act of deceit. As such, they were clearly matters which were relevant within the meaning of Mil. R. Evid. 401 to establish appellant's prior act of falsehood. More importantly, the adverse nature of these omissions coupled with appellant's admitted interest in being selected [for warrant officer] reasonably tended to show these omissions were intentional. The relevance of the suggested evidence was not obviated simply because the omissions pertained to additional acts of prior misconduct which might unfavorably reflect on appellant's character. [10]

The court stated further that the relevance of a prior act of deceit does not per se dictate its admissibility. The evidence must also withstand scrutiny under Mil. R. Evid. 403 and not be "unduly" prejudicial. The probative value of Owens' omissions of his convictions from his warrant officer application was not outweighed by any unfair prejudice under Rule 403, and the court found the questions permissible. [11]

Rule 608(b) was also recently addressed by the Navy-Marine Court of Military Review in *United States v. Cantu*. [12] Cantu was found guilty of fraternization with, and communicating a threat to, PFC M, a female Marine student at Camp Lejune. PFC M was one of the government's key witnesses. The defense counsel sought to attack the credibility of PFC M with evidence that she had perpetrated a fraud upon the government by submitting a false urine sample and had solicited others to help her. The military judge ruled that the evidence of PFC M's prior deceit was irrelevant and prohibited defense counsel from questioning her about it. The Navy-Marine court found that the military judge abused his discretion under Mil. R. Evid. 403 and that the evidence was "highly probative of her character for truthfulness, and proper cross-examination concerning this alleged incident would have fit neatly within the requirements of Mil. R. Evid. 608(b)." [13] The court stated further that failure to allow the defense to question the witness concerning her prior act of deceit denied the accused his "constitutional right to impeach PFC M." [14]

Impeachment Using Evidence Contradicting the Witness' Testimony

Although the courts in *Owens* and *Cantu* concluded that the impeachment evidence was highly relevant, they failed to indicate what the results would have been had Owens and PFC M simply denied that the events ever took place. Rule 608(b) would seem to bind the defense to the witness' denial.

The most troublesome aspect of Rule 608(b) is the limitation it apparently imposes on the use of extrinsic evidence. Rule 608(b) allows counsel to question a witness concerning specific instances of deceitfulness, but it seems to forbid proving the deceitful act with extrinsic evidence. In other words, counsel seems bound by the answers given by the witness. *Owens* demonstrates the court's strict interpretation of Mil. R. Evid. 608(b) in prohibiting the introduction of extrinsic evidence to attack a witness' credibility. While the court found that the evidence suggested in trial counsel's question had "substantial probative value" and clearly addressed a matter contested by the parties and that the strength of the evidence showing Owens' falsehoods was considerable, the court determined that "[u]nder Mil. R. Evid. 608(b), the prosecution could not introduce extrinsic evidence of appellant's prior falsehoods, by, for example, calling the personnel specialists who processed appellant's application." [15] The court's decision indicates that had Owens persisted in his denials, the government would have been bound by his negative responses under Mil. R. Evid. 608(b). This would have left the government with no admissible evidence that the deceit actually occurred. Moreover, under such circumstances, it is unclear whether an instruction on the limited use of impeachment evidence would be proper, because there would be no evidence upon which to instruct.

The potentially adverse ramifications of such an interpretation of Rule 608(b) upon the truth-seeking process are better appreciated when one considers a hypothetical situation in which the accused persists in his denials of any prior falsehoods and the prosecution has proof of several instances of deceit by the accused. What can prosecutors do when during cross-examination the accused makes a total denial? According to Rule 608(b) and current military case law, it may be urged that the government can go no further in its effort to impeach. This situation leaves court-members in an interesting predicament. Are they free to disregard the accused's responses and thus believe that the deceitful act did occur? Upon what evidence can the member base such a belief? Apparently, the members would be left with only the questions by the prosecutor and the demeanor of the accused following his denials. The prosecutor, of course, may accomplish his or her objective of impeaching the witness by adroitly continuing to press the witness for a truthful answer. Yet, this approach too will be unsuccessful if the witness refuses to yield. Phrasing the questions with a certain emphasis, or cross-examining the witness with the evidence in hand and referring to it to retrieve a date or other fact may coax the witness to tell the truth. It may also apprise the members that extrinsic evidence exists to support the questioner's position. The latter exhibition, however, may run afoul of Mil. R. Evid. 103, as counsel generally may not refer to evidence that is not admissible. [16]

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[10] *Id.* (citation omitted).

[11] *Id.* The court applied Rule 403 to hold a part of the question about Owens' arrest improper. The court decided that identifying the victim of the assault a appellant's second wife was unduly prejudicial. There was little probative value to this additional information and the potential for prejudice was great, as appellant was on trial for the murder of his third wife. *Id.* at 124–25.

[12] 22 M.J. 819 (N.M.C.M.R. 1986).

[13] *Id.* at 824.

[14] *Id.*

[15] *Owens*, 21 M.J. at 124.

[16] Mil. R. Evid. 103(c).

The matter is further complicated if the questioning counsel knows beforehand that the witness will deny the deceitful acts. In such a situation, questioning under Rule 608(b) apparently would be an exception to the general rule that "[if] evidence sought to be elicited from a witness is barred by the rules of evidence, then questions suggesting the existence of the evidence are likewise improper, notwithstanding the negative response from the witness."[17] The problems resulting from the strict application of Rule 608(b) are numerous. Neither the courts nor the commentaries on Rule 608(b) explain how the rule's limitation on the admissibility of extrinsic, yet relevant, evidence serves the truth-seeking process.

This is graphically illustrated in *United States v. Rappaport*[18] when it was before the Air Force Court of Military Review. Contradictory evidence was the focus of attention. Major Rappaport, a psychologist, was charged, *inter alia*, with soliciting one of his patients, Debbie A, and her husband, Sergeant A, to use and possess marijuana. On direct examination, the accused, in addition to denying the vast majority of accusations against him, stated that he had only used marijuana once before. He further testified on direct examination that he had been administered a number of urinalysis tests for drugs during his Air Force career and that the results had always been negative. The court of military review found that "[t]he clear implication of his direct testimony was that he did not use drugs except for the one occasion he admitted to."[19] The prosecution had evidence that the accused had smoked marijuana on a number of occasions with his supervisor, Dr. B. On cross-examination, the accused denied that he had ever used marijuana with Dr. B. In rebuttal, the prosecution called Dr. B, who testified concerning his use of marijuana with the accused. Although the trial judge admitted the evidence under Mil. R. Evid. 404(b)[20] as tending to prove the accused's intent to commit the charged offense, the Air Force court examined the testimony of Dr. B under 608(b). That court concluded that, under Rule 608(b), the prosecutor was free to cross-examine the accused concerning the prior use of marijuana, but that the military judge erred by admitting extrinsic evidence after the accused had made his denial. In other words, according to the Air Force court, the prosecution and the trial court were bound under Mil. R. Evid. 608(b) by the accused's denial. Even though the accused had made his prior use (or nonuse) an issue in the case, the government could not rebut the accused's assertions by presenting extrinsic evidence. The dissenting opinion in *Rappaport* succinctly discussed the issue:

> All one need do is look to the purpose of Rule 608(b) as well as its wording. The purpose of Rule 608(b) is to prevent *collateral* matters from assuming a prominence at trial out of proportion to their significance. Accordingly, the rule is meant to prevent minitrials on extrinsic evidence which relates wholly to collateral issues which may confuse the factfinders. . . . The collateral matter which the rule is aimed directly at precluding is evidence offered *solely* to impeach a witness' credibility, *i.e.*, to show the witness has a propensity to lie. . . . However, where the evidence is proffered to contradict a witness' testimony on a material issue, it is admissible notwithstanding Rule 608(b).[21]

The dissenting opinion went on to point out that the accused's testimony on direct examination created the impression that he was not a user of marijuana, which clearly related to the charge concerning his use of marijuana. Accordingly, Dr. B's testimony was not evidence of a collateral matter. "Simply stated, when evidence is offered to contradict the witness on a material issue, it is no longer collateral."[22]

The Court of Military Appeals, in reviewing the lower court's decision in *Rappaport*, examined the testimony of Dr. B under Rule 404(b), which was also used by the trial court as basis for its admissibility. The court found that the evidence proved propensity to commit the charged offense and not plan and was therefore inadmissible.[23] The Court of Military Appeals did not comment on the Air Force court's determinations as to the applicability of Rule 608.

Analyzing Situations Involving the Use of Extrinsic Evidence to Contradict

There are five common situations involving the use of extrinsic evidence to contradict a witness' testimony. Each requires a different analysis. These are:

a. a witness' testimony on direct examination states facts that can be contradicted;

b. a witness' testimony on direct examination *infers* facts that can be contradicted;

c. a witness' testimony on cross-examination directly or inferentially raises material facts that can be contradicted;

d. cross-examination lures the witness into a "trap" on a collateral issue when the witness testifies to facts that can be contradicted; and

e. when the accused is the witness.

Situations A and B

In *Owens*, the accused originally denied that he had ever lied under oath or affirmation when cross-examined by the prosecutor. In that case it was evident that the prosecutor set up the issue of the accused's prior deceit in order to expose him as a person unworthy of belief. This issue

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[17] United States v. Brookes, 22 M.J. 441, 443 (C.M.A. 1986).

[18] 19 M.J. 708 (A.F.C.M.R. 1984), *aff'd on other grounds*, 22 M.J. 445 (C.M.A. 1986).

[19] *Id.* at 712.

[20] Mil. R. Evid. 404(b) provides:
Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[21] 19 M.J. at 714 (Snyder, J., concurring in part and dissenting) (citations omitted).

[22] *Id.*

[23] 22 M.J. at 447.

permitted the Court of Military Appeals to apply Rule 608(b) in a classical fashion. The court's barring of extrinsic evidence to prove the prior act of deceit might have been different had Owens "opened the door" concerning his honesty. For example, if Owens, on direct examination, had stated directly or inferred that he was a truthful person, the prior deceit would not only be relevant as impeachment evidence pertaining to his general character for truthfulness but would also be relevant to *contradict* his direct testimony. The use of non-collateral extrinsic contradictory evidence is not then limited by Rule 608(b).[24]

Federal case law supports the use of extrinsic evidence for impeachment purposes by contradicting the direct testimony of a witness. In *United States v. Babbit*,[25] the defendant on direct-examination, claimed that he did not have a police record. The court of appeals found that it was proper for the prosecutor to introduce extrinsic evidence of Babbit's two prior arrests even though they were remote in time. The court ruled that "[o]nce having testified voluntarily—and untruthfully—on the subject, [the accused] could not complain if the actual facts were brought to light."[26]

Other Federal circuit courts have reached similar results. In *United States v. Cusmano*,[27] the accused was tried for violation of the Hobbs Act by obstructing, delaying, and affecting commerce through extortion. On direct examination, Cusmano testified that he had a close business relationship with his employees and also testified concerning the economic collapse of his company. The prosecution was allowed to introduce extrinsic evidence that contradicted Cusmano's intimation that he cared for his employees. The extrinsic evidence documented that Cusmano had placed the company's money in his personal account, left the firm with no assets, and then filed bankruptcy for the company. The court found that the evidence was properly admitted for "purposes of impeachment."[28]

Situation C

If the testimony sought to be impeached was brought out during cross-examination, will extrinsic evidence be admissible for impeachment purposes? To deny admission of the evidence in any case would be consistent with the general prohibition against creating an issue solely through cross-examination and then attacking the witness.[29] In fact, however, not all extrinsic evidence admitted for impeachment by contradiction has been in response to testimony elicited during direct examination. When the witness lies on cross-examination concerning a material issue, the prosecution has been allowed in some cases to impeach by introducing evidence that contradicts the witness.

In *United States v. Jeffries*,[30] the accused stated during the sentencing procedure that he would like to complete his enlistment and that, if retained, he would "do better." On cross-examination, the prosecutor asked the accused when he decided that he wanted to "do better." The accused responded that he had been trying to do better "ever since what happened." The court held that it was not error for the trial counsel to cross-examine the accused concerning violation of military standards since the date of the offense and to present witnesses to describe those violations.[31]

Similarly, in *United States v. Opager*,[32] the accused defended herself by claiming that she was entrapped into selling cocaine. To prove Opager's predisposition to sell cocaine, the government produced a witness, Posner, who testified that he had seen Opager use and sell cocaine before. During cross-examination, Posner explained that he had worked with the accused in a beauty salon in 1974 and 1976 and had seen her sell drugs during those times. To impeach Posner, the defense sought to introduce documents to prove that Posner and the accused had not worked together since 1974. The trial judge refused to admit the documents on the basis that they were inadmissible under Rule 608(b). The court of appeals, in reversing the trial court, pointed out that the extrinsic evidence was not an attack on the witness's general character for truthfulness, which is prohibited under Rule 608(b). Rather, the evidence contradicted a "specific fact material" to Opager's defense.[33] In support of its position, the court opined:

> We consider Rule 608(b) to be inapplicable in determining the admissibility of relevant evidence introduced to contradict a witness' testimony as to a material issue.
>
> . . . .
>
> Similarly, we believe that Rule 608(b) should not stand as a bar to the admission of evidence introduced to contradict, and which the jury might find disproves a witness' testimony as to a material issue of the case.[34]

It thus seems clear that Rule 608(b) does not prohibit the introduction of extrinsic evidence to contradict the testimony of a witness. Rather, Rule 608(b) only restricts extrinsic evidence that is used exclusively to show the witness' general character for truthfulness.

Situation D

The Court of Military Appeals has recognized the distinction between impeachment under Rule 608(b) and

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[24] *See* United States v. Banker, 22 M.J. 207, 211 (C.M.A. 1986).

[25] 683 F.2d 21 (1st Cir. 1982).

[26] *Id.* at 25.

[27] 729 F.2d 380 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984).

[28] *Id.* at 383.

[29] United States v. Maxwell, 21 M.J. 229 (C.M.A. 1986).

[30] 47 C.M.R. 699 (A.F.C.M.R. 1973).

[31] *Id.* at 700–01. *See also* United States v. Havens, 446 U.S. 620 (1980); Criminal Law Division, The Judge Advocate General's School, U.S. Army, Criminal Law—Evidence, para. 7–4i (June 1986) (to be published as Dep't of Army, Pam. No. 27–22).

[32] 589 F.2d 799 (5th Cir. 1979).

[33] *Id.* at 801.

[34] *Id.* at 802.

impeachment by contradiction in *United States v. Banker.*[35] The defense sought to introduce extrinsic evidence to contradict the testimony of a government informant. The informant testified under cross-examination that he was not involved in a separate methamphetamine transaction. After purposely eliciting this denial from the witness, the defense sought to impeach him with extrinsic evidence of the drug transaction. The government argued that Mil. R. Evid. 608(b) prohibited the introduction of extrinsic evidence to prove a specific act for impeachment purposes and the military judge agreed. On review, the Court of Military Appeals noted that Rule 608(b) governs only one of the several bases for impeachment: "Mil. R. Evid. 608(b), as with its counterpart Fed. R. Evid. 608(b), is limited to the situation where extrinsic evidence of a witness' conduct is introduced to show a witness's *general character for truthfulness.*"[36] If the defense relies on a different impeachment theory, *e.g.*, bias, prior inconsistent statement, or contradiction, Rule 608(b) does not apply.[37]

The court then considered whether the extrinsic evidence was admissible to impeach by contradiction. It noted that the federal practice allows contradiction on a material issue regardless whether it is raised on direct or cross-examination.[38] In addition, a party may use extrinsic evidence to contradict a collateral matter asserted on direct examination.[39] In *Banker*, however, the extrinsic evidence concerned a collateral matter first introduced on cross-examination. In such a case, extrinsic evidence is barred: "[W]e are not convinced that the federal practice is so broad as to allow extrinsic evidence to be used to contradict a witness on a collateral matter asserted on cross-examination."[40]

The decision in *Banker* focused on two factors in determining the admissibility of extrinsic evidence for impeachment by contradiction. The first is whether the testimony sought to be contradicted was elicited during direct or cross-examination. The second is whether the testimony involved a material or collateral matter. If the testimony was elicited during direct-examination, extrinsic evidence is admissible to contradict both material and collateral matters. If the issue is first raised during cross-examination, the contradiction may be proved by extrinsic evidence if it concerns a material issue.

Situation E

A final area involves the use of suppressed evidence to impeach an accused. Under Mil. R. Evid. 311(b)(1), evidence "obtained as a result of an illegal search or seizure may be used to impeach by contradiction the in-court testimony of the accused." Such impeachment is permitted to contradict assertions made by the accused on direct examination and also to contradict assertions made on cross-examination if the questions are within the scope of the direct examination and they would be apparent to a competent cross-examiner.[41] The government is not free, however, to introduce collateral matters during cross-examination to "lay a trap" for the accused that "will be sprung in rebuttal."[42] The contrasting decision in *United States v. Havens*[43] and *Angello v. United States*[44] illustrate these principles. In *Havens*, customs authorities arrested Havens and a confederate, McLeroth, after finding cocaine sewn into makeshift pockets in a T-shirt the confederate was wearing. The customs officers found a T-shirt in Havens' luggage with pieces cut out that exactly matched the pockets in McLeroth's T-shirt. Havens, however, successfully moved to suppress the items taken from his luggage because the customs officers had no warrant.

At trial, McLeroth testified that Havens had sewn the makeshift pockets into the altered T-shirt and had given it to him. After Havens testified on direct examination that he had nothing to do with McLeroth or the drugs, the prosecution asked Havens on cross-examination whether he had T-shirts in his luggage and whether he recognized the T-shirt with the pieces cut out. When Havens denied knowledge of the T-shirts, the prosecution called a government agent to testify that the shirt was found in Havens' suitcase.

The Supreme Court upheld this use of extrinsic evidence. The cross-examination merely followed the issues raised by Havens' testimony on direct. The questions were not "smuggled in" but "would have been apparent to a reasonably competent cross-examiner."[45] The Court noted that the purpose of a trial is to determine the truth; this function would be severely impeded if the prosecution could not cross-examine in these circumstances.[46]

In *Angello*, however, the defendant successfully moved to suppress a can of cocaine seized from his house. At trial, Angello testified, but raised no issue concerning the cocaine. Nevertheless, on cross-examination, the prosecution asked Angello if he had ever seen drugs before. After his denial, the prosecution sought to ask him about the cocaine. The Supreme Court rejected this line of questioning

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[35] 15 M.J. 207 (C.M.A. 1983).

[36] *Id.* at 210 (emphasis added).

[37] *Id.*

[38] *Id.* at 211.

[39] *Id.*

[40] *Id.* at 211–12. The court did hold that the evidence was admissible under Rule 608(c) to show the informant's motive for testifying. *Id.* at 212. *Banker* is an excellent illustration of the need to consider all theories of impeachment when presenting evidence.

[41] *See* United States v. Havens, 446 U.S. 620, 627 (1980).

[42] *See, e.g.*, United States v. Pantone, 609 F.2d 675, 683 (3d Cir. 1979); United States v. Bowling, 16 M.J. 848, 852–54 (N.M.C.M.R. 1983).

[43] 446 U.S. 620 (1980).

[44] 235 U.S. 20 (1923).

[45] 446 U.S. at 627.

[46] *Id. See also* Tyler v. United States, 193 F.2d 24 (D.C. Cir. 1951) (polygraph results may be used to rebut defendant's claim that his confession was coerced).

because Angello's direct testimony "did nothing . . . to justify cross-examination in respect of the [cocaine]."[47]

Thus, the accused's testimony opens the possibility of impeachment as to matters raised on direct examination and any matter that a reasonable cross-examiner would pursue on cross-examination.

Conclusion

Current case authority indicates that although counsel may cross-examine a witness whose credibility is undeniably in issue concerning prior acts of deceitfulness, he or she is bound by the witness' answers. This is so even though the answers may clearly be untruthful. Rule 608(b), in an effort to prevent litigation of collateral matters, prevents the introduction of extrinsic evidence to attack a witness' general character for truthfulness. Although ample case law supports the proposition that the accused's credibility is an issue once he or she takes the stand, Rule 608(b) refuses to permit the accused's general credibility to be the subject of a mini-trial. Rule 608(b) does, however, allow counsel to cross-examine the witness concerning the witness' prior deceitful acts. This was aptly demonstrated in *United States v. Owens*, where the accused, under a pressing cross-examination, reluctantly admitted that he had previously lied under oath. An effective cross-examination may yield similar results in most cases. Military courts have yet to deal with a case where the witness persists in a denial of any prior deceit, despite evidence to the contrary. Whether the members are free to disbelieve the witness' denial, despite no admissible evidence to the contrary, and the propriety of any limiting instruction, are questions still unanswered.

The more serious problem with the use of Rule 608(b) is its erroneous application to impeachment evidence that challenges something other than the witness' general character for truthfulness; specifically, the improper use of Rule 608(b) to exclude evidence that contradicts the testimony given by a witness. Evidence that contradicts a witness on a relevant and material issue in a case is not only proper for inquiry on cross-examination, but also should be capable of proof by extrinsic evidence. Contradictory evidence is not evidence concerning a witness' general character for truthfulness or untruthfulness and therefore escapes the limitations of Rule 608(b). The contradictory evidence may adversely reflect on the witness' character for truthfulness in addition to impeaching his or her prior testimony. Evidence admissible for one purpose and inadmissible for another is nevertheless admissible, however.[48] While generally counsel cannot create an issue during cross-examination and then impeach the witness with contradictory evidence, when a witness "opens the door" on direct examination concerning a relevant issue, there is no rule or reason that prohibits the introduction of extrinsic evidence to expose any falsity in the witness' testimony. The fact finder should have a right to probative evidence that exposes false testimony concerning relevant issues. Furthermore, counsel should be free to introduce evidence that contradicts a witness's testimony under cross-examination if the testimony to be impeached concerns a material issue and is related to evidence or testimony already before the members. This was aptly demonstrated in *United States v. Opager*. Furthermore, Rule 611(b) grants the trial judge discretion in allowing counsel, during cross-examination, to inquire into additional matters as if on direct.[49] If such additional matters are relevant and concern a material issue, counsel should be able to impeach the witness as if the testimony was given on direct examination.

Counsel are bound by the answers a witness gives only when the impeaching evidence falls within the narrow parameters of Rule 608(b) or concerns a purely collateral issue. Defining what is or is not a collateral matter is not easy. Most courts agree, however, that the trial judge is in the best position to make that determination. Rule 403 specifically allows the military judge to exclude evidence that might confuse the issues, mislead the members, or cause undue delay. For instance, suppose the accused in *Rappaport*, in addition to claiming that he did not smoke marijuana except on one occasion, also testified that he does not smoke cigarettes, and the prosecution has competent evidence that the accused smoked marijuana with Dr. B and that he does, in fact, smoke cigarettes. Both assertions made by the accused could clearly be contradicted by competent evidence. Do both statements made by the accused, although false, involve a material issue? Whether the accused has smoked marijuana before is certainly an issue because he is charged with using marijuana and his testimony intimated that he was not a marijuana user. In contrast, cigarette smoking is not an issue in the case. Therefore, although the prosecution has contradictory evidence concerning both statements made by the accused, the military judge under Rule 403 could allow extrinsic evidence to disprove the falsity on the material issue and disallow extrinsic evidence as to the collateral issue. This allows the fact finders to have truly relevant evidence before them and is consistent with common law by preventing the trial from becoming mired in irrelevant matters that are not at issue.

A similar balancing approach could be used in determining the admissibility of evidence of general character for truthfulness. Unfortunately, in an effort to prevent litigation of collateral matters, Rule 608(b) and decisions such as *Owens* automatically exclude what is recognized as highly probative evidence (evidence of prior deception under oath) that concerns what is admittedly a relevant issue (the witness' credibility). The rote exclusion of extrinsic evidence of a witness' credibility takes on a critical dimension when credibility of the witness is the paramount issue. A military judge could distinguish between episodes of deceit that are truly probative of truthfulness, such as lying under oath, and those episodes of deceit that are trivial in nature and would waste the court's time. Until the trial judges are given this discretion, relevant evidence concerning credibility will be excluded under Rule 608(b). As aptly noted in *United States v. Opager*, excluding otherwise relevant evidence under Rule 608(b) "completely divorce[s] legal proceedings from the truth seeking process."[50]

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[47] 235 U.S. at 35.

[48] United States v. Abel, 469 U.S. 45 (1984).

[49] Military Rule of Evidence 611(b) states: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

[50] 589 F.2d at 803.

DAD Notes

Cannon[1] Fire—Take Cover

Defense counsel must remain vigilant in rendering effective assistance of counsel by fulfilling their post-trial responsibilities.[2] In the area of clemency recommendations by the military judge, the Army Court of Military Review fired its first shot in *United States v. Davis.*[3] The *Davis* court held that trial defense counsel was ineffective when she neglected to submit the military judge's discharge suspension recommendation to the convening authority.[4] The court's analysis of the impact of the omission apparently hinged on whether there was a "reasonable probability" that the convening authority would have granted clemency had he known about the favorable recommendation.[5]

The next volley was launched in *United States v. Cannon.*[6] The accused was convicted, inter alia, of larceny of $11,373.00. After he announced the sentence, the military judge told the accused, "should you make significant progress towards restitution, I recommend that the convening authority suspend or disapprove a pro rata share portion of confinement in excess of six months."[7] Although the government had collected $2,455.81, trial defense counsel did not inform the convening authority of that fact.[8] The court held that defense counsel's omission constituted plain error[9] and granted the requested relief.[10]

The holding was apparently an attempt by the court to stop just short of labeling defense counsel ineffective. But a clear warning shot has been fired. "Henceforth, defense counsel are admonished that a failure to timely advise the convening authority of *any* clemency recommendation made on the record by the military judge may not be so charitably reviewed by this court."[11]

The court did not mention the standard used in *Davis,* that is, whether there must be a reasonable probability that the convening authority would have granted clemency had he known about the clemency recommendation. The court instead seemingly created almost a per se rule that the failure to advise the convening authority about any clemency recommendation will be ineffective assistance of counsel. In that light, the case must be interpreted as an expansion of *Davis.* Therefore, defense counsel are urged to submit to the convening authority *all* clemency recommendations by the military judge unless the accused waives submission in writing.[12] Captain Peter M. Cardillo.

Possessors Beware

Soldiers who engage in the possession and use of illegal drugs may find themselves being convicted of distribution of drugs if they transfer those drugs to another person, even if the transfer of the drugs was done for a limited purpose. In a recent opinion, *United States v. Sorrell,*[13] the Court of Military Appeals held that "the only intent required to constitute the offense of distribution is the accused's intent to deliver drugs to the possession of another."[14] Therefore, the offense of distribution is complete "when physical possession is transferred from one person to another, regardless of the knowledge or culpability of the recipient."[15]

In this case, appellant had been involved in an automobile accident in Germany. Two German nationals stopped to render assistance. Appellant, who was changing duty stations, had his car loaded with boxes of household goods. Packed among his belongings were various types of drugs. Appellant was waiting for an ambulance to transport him to the hospital when the two Germans offered to take his

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[1] United States v. Cannon, 23 M.J. 676 (A.C.M.R. 1986).

[2] *See* Spahn, *Ineffective Assistance During the Post-Trial Stage,* The Army Lawyer, Nov. 1986, at 36, for an excellent discussion of post-trial ineffective assistance of counsel.

[3] 20 M.J. 1015 (A.C.M.R. 1986).

[4] *Id.*

[5] *Id.* at 1019.

[6] *Cannon,* 23 M.J. 676 (A.C.M.R. 1986).

[7] *Id.* at 677.

[8] *Id.*

[9] *Id.* at 678 n.2.

[10] A 48-day confinement reduction.

[11] *Cannon,* 23 M.J. at 678 (emphasis added).

[12] This advice is broader than that given by Spahn, *supra* note 2, at 39, as *Cannon* had not been decided when that article was written.

[13] 23 M.J. 122 (C.M.A. 1986).

[14] *Id.* at 123. " 'Deliver' means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship." *Id.* (citing Para. 213g(3), Manual for Courts-Martial, United States, 1969 (Revised edition) and para. 37c(3), Part IV, Manual for Courts-Martial, United States, 1984).

[15] *Id.* at 123. The lead opinion by Judge Cox indicates that no knowledge by the recipient of the drugs is required in order to accomplish the offense of distribution. Chief Judge Everett, in a concurring opinion, however, makes a distinction between the recipient of the drugs who knows "that he has a particular physical object in his control, regardless of what he knows or suspects as to its legality, nature, or contents" and the recipient who is totally unaware that he possesses anything. *Id.* at 124. The concurring opinion uses the definition of "possess" to interpret the meaning of "distribute," *i.e.,* to deliver to the *possession* of another. In applying that definition to the term "distribute," Chief Judge Everett found that the distribution of drugs will not be complete until the accused has delivered the drugs to the knowing and conscious possession of another. *See* Manual for Courts-Martial, United States, 1969 (Rev. ed), para. 213g(2). [hereinafter MCM, 1969]. Chief Judge Everett pointed out that had appellant secretly placed the drugs in the Germans' car, it is unlikely that the requirement of knowledge would have been met and thus, the offense of distribution would not have been accomplished. The two Germans in *Sorrell* consciously became bailees of the boxes and therefore had knowing possession. Their ignorance of the contents of the boxes was immaterial.

effects to the military police station at Kreuzberg Kaserne. The Germans intended to contact appellant's friend, whom appellant hoped would safekeep the items until appellant could pick them up. When the friend could not be contacted, the military police conducted an inventory of the boxes and discovered the drugs contained therein.

At trial, appellant claimed that he had forgotten about the drugs at the time of delivery of the boxes to the Germans and did not remember that the drugs were in the boxes until he saw them at the military police station. The Court of Military Appeals, however, held that the evidence supported a finding that appellant knowingly and voluntarily transferred physical possession of the drugs.[16]

Under *Sorrell*, an accused may be found guilty of distribution of drugs if he transfers the drugs to another, regardless of his intent to involve others in drug usage or sale. It does not matter that an accused intends to retrieve the drugs at a later time or that he only transfers the drugs to another for safekeeping. Even if the accused claims that he forgot that an item he transferred to another contained drugs, the court will probably be able to determine from the facts that the accused was cognizant of his own possession of the drugs at the time of the delivery of the container.[17] Once the court finds sufficient facts to support the conclusion that the accused had knowledge of the drugs that he possessed at the time of delivery, the offense of distribution will be completed. Captain Donna L. Wilkins.

[16] 23 M.J. at 124. The Army Court of Military Review found that appellant's delivery of the drugs was knowing and conscious based on appellant's use of drugs prior to the accident, the presence of marijuana in his pocket, the contraband found in the glove compartment of the rental car, and the wide assortment of smoking devices, drug paraphernalia, and tablets of controlled substances found among appellant's possessions. United States v. Sorrell, 20 M.J. 684, 685–86 (A.C.M.R. 1985).

[17] At trial, appellant pled guilty to possession of the drugs for which he was found guilty of distributing. In order to be found guilty of the offense of "possession of drugs," the possession must be knowing and conscious. *See* MCM, 1969, para. 213g(2).

Army Court of Military Review Note

Reflections on Contemporary Sources of Military Law

H. Lawrence Garrett, III
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Mr. Garrett was a featured speaker at the annual All-Services Military Judges' Conference sponsored by the Court of Military Appeals. The 1986 conference was hosted by the Air Force Court of Military Review. It was held on November 21, 1986, at the Federal Bar Building under the auspices of the Federal Bar Association Judiciary Section.

Mr. Garrett, a former submariner, Navy flight officer, and judge advocate, spoke about the considerations and processes involved in amending the Uniform Code of Military Justice and the Manual for Courts-Martial. His remarks are printed below.

Thank you Judge Hodgson. . . .

Chief Judge Everett, Judge Cox, Judge Sullivan, distinguished judges of the Courts of Military Review. . . .

I am grateful for your invitation to address this most important conference. At the outset, I would like to express my deep appreciation for the first-class work performed by the judges of the courts of military review. Those of you who have worked in the Pentagon are keenly aware of the key role played by the CMRs in ensuring public support for the military justice system in particular and our national defense in general. Each year, the Secretary of Defense receives hundreds of letters from parents, neighbors, and friends of service members who have been tried by court-martial. If we could not rely upon you, there would be substantial pressure on the Secretary and his key advisers to become involved in the details of numerous cases, diverting him from his broader responsibilities. In responding to such letters, we can point with pride and confidence to your scholarship, experience, and judicial temperament as assurances that each case involving a punitive discharge or confinement for a year or more will receive your full and fair consideration.

We also appreciate the sacrifices required in your current assignment in Washington. I am referring not only to the challenges of urban commuting and the high cost of living, but also to the challenge of working in a relatively monastic environment. Many of you have come from dynamic, high-level commands, where you had daily contact with senior commanders, management responsibility over many lawyers, and a wide variety of fascinating legal challenges related to military training and operations. I know that for many of you, the first month of isolated devotion to briefs and records of trial, the silent telephone, and the lack of direct contact with military activities comes as quite a shock. I hope that conferences such as this one are successful in creating a sense of shared purpose—and in convincing each of you that your work is of vital importance to our commanders, our service members, and our civilian leadership.

I have been asked to speak with you today from my perspective as General Counsel on the process of drafting, implementing, and interpreting amendments to the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial. I have a close, personal interest in this subject. My government experience has convinced me of the importance of assessing the impact in the field of statutes and rules drafted in Washington. My Navy career included enlisted submarine service, duty as a Naval flight officer, and the full range of judge advocate assignments, including

service as trial and defense counsel, as well as a tour in the Office of the Judge Advocate General. My duties as Associate Counsel to the President involved many aspects of the President's role as Commander-in-Chief, including review of the Manual for Courts-Martial. Having seen the effect of regulations from the perspective of the user as well as the issuer, I am keenly aware of the need to draft statutes and regulations in a manner that helps rather than hinders the performance of DoD functions.

My remarks will cover the following topics:

first, a description of the process we use in amending the UCMJ and the Manual for Courts-Martial, with specific reference to the manner in which those in this audience can participate in the process;

second, the general philosophy that guides our consideration of proposed changes; and

third, a description of the specific changes recently approved by Congress and the President that are likely to have a direct impact on cases that are tried by court-martial before the end of this calendar year.

Some of you may be familiar with the old Washington saying that there are two things in life which you should never see from the inside—the making of sausages and the enactment of laws! Having no desire to spoil your lunch, I shall resist the temptation to share with you my knowledge of salami and bologna (at least of the delicatessen variety!). I hope that my discussion of military justice legislation will neither ruin your appetite nor discourage you from participating actively in the legislative process.

The Legislative Process

In civilian jurisdictions, at both the federal and state level, we look primarily to the legislature for the general law governing the judicial process. In the military justice system, however, the majority of our legal requirements are set forth in the UCMJ and the Manual for Courts-Martial, an executive order. Therefore, when I speak of the legislative process in these remarks, I shall include the system for amending the Manual.

As appellate judges, you are uniquely situated to observe the strengths and weaknesses of the Manual and the Code. Although your judicial role requires neutrality on substantive legal matters, as well as avoidance of any actions that would create the appearance of partiality, there are many aspects of the court-martial process that primarily involve efficiency and effectiveness. As I discuss the details of the legislative process, please consider the many opportunities that are provided for you to have a significant input into law reform. It is my hope that after this conference, when you encounter a rule that creates a problem—either because it is anachronistic or inefficient—you will bring the matter to our attention so that corrective action can be taken for the benefit of the entire system.

Evolution of the Joint Service Committee on Military Justice

The Joint Service Committee on Military Justice is the group responsible for drafting and reviewing proposed amendments to the UCMJ and the Manual. The Committee consists of the head of the Criminal Law Division (or its equivalent) from the each of the five services, along with a nonvoting representative from the Court of the Military Appeals. The Committee supervises the activities of a Working Group, which has a representative from each service and the court.

One of your former colleagues, federal district Judge Wayne Alley (Okla.) is the "godfather" of the Joint Service Committee in terms of its present responsibilities. The Joint Service Committee was originally established as a result of the problems encountered by the group that drafted the 1969 version of the Manual for Courts-Martial. The drafting group reported that their task had been "monumental" due to the failure during the fifties and sixties to consider adequately many of the developments in law that occurred after issuance of the 1951 Manual (which implemented the new Uniform Code of Military Justice). An ad hoc group was formed, and a formal charter was signed by the services Judge Advocates General in 1972 assigning to the Committee responsibility for considering amendments to the UCMJ and the Manual. The chairmanship rotated among the services on a biennial basis, with the group operating primarily on the basis of consensus.

In 1975, the chairmanship rotated to the Chief of the Army's Criminal Law Division, then-Colonel Wayne Alley. Colonel Alley was particularly well-suited to the job, having served previously as a trial and defense counsel, military trial judge, and appellate judge on the Army Court of Military Review.

The original motivation for establishment of the Joint Service Committee—the need to keep the Manual current with developments in the law—was a matter of particular concern to Colonel Alley. In January, 1975, President Ford signed legislation establishing the Federal Rules of Evidence, which contained many reforms greatly simplifying trial of criminal and civil cases. Other changes in federal criminal law, particularly as a result of Supreme Court decisions, also created the potential for parallel changes in the Manual and the Code. In view of Article 36, UCMJ, which generally requires us to follow federal criminal rules of evidence and procedure to the extent practicable and not inconsistent with the Code, Alley believed a vigorous and systematic review effort was necessary to comply with the Code.

Despite these opportunities, Colonel Alley found his chairmanship to be a source of frustration rather than reward. In the absence of a crisis, the requirement for consensus proved to be a powerful disincentive to developing the level of effort on a joint service basis necessary to produce reform proposals.

By late 1977, little had been accomplished. At that time, however, one of my predecessors, Deanne Siemer, developed an interest in military justice and asked a member of our staff to meet with the services to assess the legislative process. Colonel Alley readily seized on this chance to break the logjam. He recommended that an effort be initiated to adopt the Federal Rules of Evidence, with appropriate modifications, into the Manual for Courts-Martial. Alley suggested that the project would serve three separate goals:

first, it would meet the Article 36 requirement that we generally apply federal rules;

second, it was a discrete project that could be accomplished with one year's concerted effort, establishing a pattern of work that the Joint Service Committee could carry into the future; and

third, the efficiencies in trial practice generated by the new rules would demonstrate to the services the benefits of serious attention to law reform on a sustained basis.

Colonel Alley's initiative was adopted by the General Counsel, who established the Evidence Project as a DoD requirement and placed a member of our staff on the Working Group. By the time Wayne Alley was reassigned to Europe in mid-1978, eventually to pin on a star, the process that he set into motion ensured the success of the endeavor—and the achievement of his three goals.

The new Military Rules of Evidence were issued by the President in 1980.

Upon completion of this project, a thorough review of the Manual was initiated, resulting in the comprehensive revision of 1984. In a parallel effort, the Department revived languishing legislative proposals to eliminate many of the inefficiencies in the Code, such as the post-trial review, leading to passage of the Military Justice Act of 1983.

In compliance with the President's direction in the Executive Order promulgating the 1984 Manual, Deputy Secretary Taft issued DoD Directive 5500.17 in January, 1985, which requires an annual review of the Manual to ensure that it is current and useful. This Directive establishes the Joint Service Committee under the supervision of my Office, and assigns the Committee the responsibility for preparation of the annual review. The amendments resulting from the first annual review were issued by the President in early 1986. I shall discuss later in my remarks the proposals generated by the second annual review.

The drafting and review process

I would like now to switch gears, turning from history to contemporary practice, and discuss with you how amendments to the Code and Manual are generated, reviewed, and approved.

Under DoD Directive 5500.17, the annual review of the Manual is designed "to ensure that the Manual fulfills its fundamental purpose as a comprehensive body of law governing military justice procedures and as a guide for lawyers and non-lawyers in operation and application of such law." The Directive requires the Joint Service Committee to consider judicial and legislative developments in the civilian sector, as well as current military practice and judicial precedents, to meet the mandate of Article 36. It specifically recognizes the "requirement that the Manual must be workable across the spectrum of circumstances in which courts-martial are conducted, including combat conditions."

The annual review must be submitted to me by February 1 of each year. This permits consideration of the previous term's decisions from the Supreme Court, other civilian tribunals, the Court of Military Appeals, and the courts of military review, and permits sufficient time to consider any last minute legislative changes. Right now, the Working Group is in the midst of the annual review for 1986. This is an excellent time for you to bring problems or proposals for change to their attention.

In addition to projects related to the annual review, the agenda for the Working Group of the Joint Service Committee includes matters submitted by my Office, the Judge Advocates General, and other interested parties. Such items may be generated by review of published cases, congressional inquires and proposed legislation, input from the field, and requests from the Code Committee (which consists of the judges of the Court of Military Appeals, the Judge Advocates General, the Director of the Marine Corps Judge Advocate Division, the Chief Counsel of the Coast Guard, and two private citizens appointed by the Secretary of Defense).

Based on its review of a problem, the Working Group develops either a legislative change to the UCMJ or a draft amendment to the Manual, depending on the nature of the issue. Manual amendments are made available for public comment, normally for a seventy-five day period. This is another key opportunity for your input, either with a comment on a proposed rule or a suggestion for an additional rule. The comments are then reviewed by the Joint Service Committee.

After approval by the Joint Service Committee, legislative changes and amendments are forwarded to my office for circulation throughout DoD for legal and policy comments. After our review is completed, both types of proposals are forwarded to the Office of Management and Budget for executive branch coordination, primarily with the Departments of Justice and Transportation. Legislative proposals are then submitted to Congress; Manual amendments go to the President after review by the White House Counsel's office.

In addition to the coordination process that I have described, the Code Committee is provided with all proposals produced by the Joint Service Committee, as well as proposals formally transmitted by DoD to Congress or the President. Although the Code Committee, as a body, does not have any executive function in the legislative process, the advice of its members is given thorough consideration in the development of these proposals.

There is an additional aspect to the legislative process that may be of interest to you as judges. Although the formal approval process is hierarchical and sequential, the process of consultation is informal and continuous. During the initial stages of drafting, for example, members of the Working Group are constantly in contact with the members of the Joint Service Committee, the Judge Advocates General, and my office. During the review process, my office consults with all of the foregoing, as well as at Department of Justice, the Department of Transportation, and the White House Counsel's Office. Proposed drafts of the Manual may be changed significantly during such interagency review.

As an alumnus of the White House Counsel's Office, I can assure you that proposed amendments are thoroughly reviewed and discussed with both Justice and Defense to ensure consistency with the President's program and his role as Commander-in-Chief. The President's signature on the Manual represents his personal approval of the document.

In other words, the Manual does not simply reflect the views of the Working Group as rubberstamped by higher authority; rather, amendments to the Manual that are

presented to the President are the product of a lively interchange among many individuals at differing levels of government, reflecting a multitude of institutional considerations, with constant attention to the policy views of the President and his role as Commander-in-Chief.

Similar considerations pertain to the congressional process. You all are familiar with the stories of power exercised by congressional staffers, particularly in view of the volume of business now before Congress. Although these staffers do have considerable influence, our experience with the Armed Services Committees does not lend any credence to the notion that legislation and committee reports do not reflect the will of Congress. Significant military justice legislation usually involves extensive hearings before the Congress, with resultant changes in the shape of the legislation. Where hearings are not held, we have given extensive briefings to the staffers, who have in turn brief their members, with a definite impact on legislative language as well as the prospects for enactment.

The Role of Congress, the President, and the Judiciary

Thus far, I have spoken primarily of the legislative process in terms of reform, perhaps creating the impression that we are looking for change for its own sake. On the contrary, we value stability, and know the importance of consistency to those of you charged with day-to-day administration of the system. At this point, I would like to discuss with you our general approach to military justice proposals in terms of balancing the sometimes competing goals of reform and stability.

Each of the three branches of government plays a vital role in maintaining stability while accommodating change. Congress has great discretion under the Constitution "[t]o make Rules for the Government and Regulation of the land and naval Forces." This has permitted development of procedures and proscription of offenses without the identical constitutional guarantees available to defendants in civilian criminal trials. The Congress has exercised this power, however, in a manner that promotes the adversarial process to ensure that fundamental fairness is present throughout the military justice system.

The President has an equally important role to play in this process. In the Manual, he determines under Article 36 which rules of evidence and procedure from the civilian sector should be adopted as "practicable" and consistent with the UCMJ. Article 56 sets forth the President's vital duty in establishing maximum punishments for virtually all offenses under the Code. His powers are not limited, however, to those set forth in the UCMJ. It is particularly noteworthy that in the introduction to the Executive Order promulgating the Manual, the President states that it is issued not only under the UCMJ, but also: "By the authority vested in me as President."

The rules set forth in the Manual do more than regulate military trials; they also set forth the Commander-in-Chief's regulations governing the actions of commanders and other military personnel in matters such as arrest, search and seizure, pretrial confinement, and interrogation. They represent the President's judgment as to the disciplinary powers necessary in the interests of national security. As such, these rules receive great deference from the courts, and are vital to sustain unique military functions such as health and welfare inspections. These rules also represent the President's judgment as to the limitations on the exercise of disciplinary power necessary to ensure the fair treatment of military personnel.

The Manual provides an unparalleled source of stability in the law. In civilian life, issues concerning the fourth and fifth amendments and rules of privileges are dependent almost entirely on developments in case law. Under the Manual, however, the detailed rules on these matters permit commanders and others in authority to exercise disciplinary powers on a day-to-day basis with guidance on virtually all recurring issues. This does not mean that the Manual answers all questions about the application of the fourth and fifth amendments to members of the armed forces, but it does permit us to narrow the range of issues to novel circumstances or matters that the President has expressly left for judicial development.

The Manual's rules on investigatory matters and privileges are particularly important in promoting uniformity on recurring issues in light of the widespread dispersion of military personnel, the absence of reported decisions at the trial level, and the tremendous variation that would otherwise result in applying civilian decisions to the circumstances of military life. The use of rulemaking on these issues also allows the President to take into the account trends in civilian law, with appropriate regard for needs of the armed forces, and to make necessary changes in the Manual without waiting for issues to be litigated through the full range of trial and appellate procedures under the UCMJ.

The final leg of the triad on which our military justice system depends is the judiciary (under both Articles I and III of the Constitution), ranging from the trial and appellate judges in the armed forces through the Court of Military Appeals and the Supreme Court. The Code and the Manual have increasingly relied on the judiciary to ensure fundamental fairness. The Congress last year expressed concern as to whether military judges were receiving recognition in the promotion process to the extent necessary to ensure quality and independence. I would be most interested in receiving your comments on this matter.

I have noted earlier the vital role played by the courts of military review in the broad range of cases involving serious punishments. The Court of Military Appeals, of course, is the "Supreme Court" of the armed forces. The existence of this civilian tribunal is absolutely crucial to the military justice system, because it instills confidence in Congress, the public, and individual service members that there will be an independent judicial review of the application of the UCMJ and the Manual to individual cases. The Department of Defense, in advocating Supreme Court jurisdiction over the Court of Military Appeals, and Congress in granting such review powers, emphasized that this step was taken in recognition of the importance of the court, and that it was to remain the primary judicial authority on military law. We are all too well aware of the significant turnover that has plagued the court in recent years, delaying important decisions and undermining stability in doctrine. Now that Judge Sullivan is in place, the Department looks forward to working with the court on measures to ensure long-term stability. At a minimum, establishment of a five-judge court is essential to ensure that the loss of a single judge neither hampers the court nor produces a substantial shift in doctrine.

Our Philosophical Approach to the Military Justice System

The Code, the Manual, and the judiciary all play an important role in balancing the disciplinary needs of the armed forces with the rights of individual service members. The importance of this balance in securing fundamental fairness was noted by Deputy Secretary (then General Counsel) Taft during hearings on the Military Justice Act of 1983:

> [T]he power of a commander over the life and liberty of his subordinates, particularly in wartime, is awesome. When exercised fairly and responsibly, it is a power that commands not only respect and obedience, but also inspires superior performance and sacrifice. If exercised in a capricious and whimsical manner, however, it breeds disrespect and disobedience—traits that are inimical to military effectiveness. [Moreover], the strength of our military is dependent upon the support we receive from civilian society. Our forces, whether based on conscripts or volunteers, are composed primarily of "citizen soldiers." The majority of our service members remain on active duty for only one term before returning to civilian life, and we are heavily dependent upon the reserves for our national defense. Unless the public in general and the parents of service members in particular are convinced that their sons, daughters, and neighbors will be treated fairly while in military service, public support for the armed forces and our missions will quickly erode. That is a development no democratic society can afford.
>
> The role of military law in the disciplinary process, the deference the courts give Congress in this area, and the importance of the court-martial process in securing public support of military service are factors that distinguish the Uniform Code of Military Justice from other laws. It is more than a criminal code: it represents a fundamental pact between the public and the armed forces as to the basic rules that establish the unique features of military service. In this sense, it is more akin to a constitution than a statute. . . .
>
> Congress has insured that the basic compact between the armed forces and society regarding military service meets the expectations of the citizenry. The President has insured that the procedural details and maximum punishments meet the disciplinary needs of commanders for an efficient and effective court-martial system, subject to the general limitations established by Congress in the UCMJ.

In practice, our philosophy results in the division of military justice proposals into four separate categories.

First, major changes concerning the fundamental rights of members of the armed forces and the unique features of military service. Such changes are rare, and occur only in light of the most serious problems and after extensive deliberation, as reflected by the enactment of the UCMJ after World War II.

Second, major changes concerning the practice of military law in the context of developments in criminal law as practiced in the civilian sector. These changes are considered after careful study of civilian practice, the impact of extending such developments to military law, and the need for modifications to meet the needs of the armed forces.

Third, changes to fill gaps in the law or clarify ambiguities. In this regard, it is noteworthy that we do not necessarily issue a rule to govern every possible contingency in the law. There is no end to the inventiveness of military personnel in creating new types of offenses, nor is there any lack of creativity on the part of commanders or counsel in producing novel problems. Issuance of new rules often can simply promote further litigation. In this area, we look to see whether the problem is a recurring matter that can be resolved through a relatively clear rule, or whether the types of issues are so varied that continued development in the law should be permitted before a centralized solution is imposed.

Fourth, housekeeping changes that affect the administration of the system without having a major impact on fundamental rights. These, of course, are the easiest type of changes, and perhaps the most important to the day-to-day efficiency of the system. We are most willing to promote changes here, subject to careful review to limit the inadvertent creation of new problems.

Recent Developments

The foregoing categories provide a useful basis for discussing changes in the Code enacted within the last month, and proposed implementing changes for the Manual for Courts-Martial. The proposals do not make major changes in the fundamental rights of service members. A number of changes were enacted, however, after assessing recent developments in civilian law.

Article 50a adopted the insanity defense standard enacted by Congress for the federal civilian sector in late 1984 (18 U.S.C. § 20). Under prior military law (Rule for Courts-Martial 916(k)), a person was not responsible for criminal conduct if the person lacked substantial capacity to appreciate the criminality of the conduct or conform his or her conduct to the requirements of law. The burden to prove sanity was on the government.

The new law limits the defense to a severe mental disease or defect which rendered the accused, at the time of the offense, unable to appreciate the nature and quality or wrongfulness of the acts. The accused must prove the defense by clear and convincing evidence. The proposed implementing amendments in the Manual require the members to vote first on the general issue of guilt as to the offense. If there is a two-thirds vote for conviction, the members will then vote on the defense, with a majority vote required for acquittal based on lack of mental responsibility. As you well know, this process will place a premium on the clarity of instructions to the court-members.

A second change adopted from civilian law amended the statute of limitations in Article 43. Under federal law, there is no statute of limitations for capital offenses, a five year general statute of limitations for other offenses, and the opportunity to replead offenses if charges were timely filed but dismissed as defective after the period has run (18 U.S.C. ch. 213). Under the former version of Article 43, however, the statute of limitations was limited to two or three years, depending on the offense, with several exceptions. This proved to be a severe handicap when dealing with readily concealed offenses, such as frauds and other white collar crimes, and there was no fundamental reason for imposing greater restrictions on the armed forces.

Other proposed Manual changes adopting federal civilian rules include authority to use clinical psychologists in sanity board proceedings (*see* 10 U.S.C. §§ 4241, 4242, and 4247), and changes to the Military Rules of Evidence to permit admission into evidence of a refusal to submit to a chemical analysis of body substances when relevant to an offense that would have been proved by the test results (*see South Dakota v. Neville*, 459 U.S. 553 (1983)).

The legislation also includes an important change to clarify a gap in current law. In *United States v. Caputo*, 18 M.J. 259 (C.M.A. 1984), the Court of Military Appeals held as a matter of statutory interpretation that jurisdiction over offenses committed by reservists during a period of duty is lost permanently at the end of a duty period unless action had been taken within that time to preserve jurisdiction. Because many offenses are not discovered during the brief periods of duty filled by reservists, this has produced a substantial jurisdictional gap that is incompatible with the total force concept. The legislation will ensure that jurisdiction is not lost upon the completion of a period of duty, and would permit the recall of reservists for disciplinary purposes.

The proposed amendments to the Manual contain a variety of other changes that could be classified as either housekeeping or clarification ambiguities. In the nature of housekeeping amendments, for example, the legislation revises the rules concerning post-trial submissions by the accused. It no longer will be necessary to make dozens of separate calculations based on the date of sentencing, the date of service of record on the accused, and the date of service of the SJA's recommendation on the accused. The new legislation will establish a simple baseline in all special and general courts-martial. The accused will have ten days from service of the record of trial or the SJA's recommendation, whichever is later, to submit matters to the convening authority for consideration.

We have initiated coordination of the Manual amendments within the Executive branch. Promulgation is anticipated during the next month.

It has been a pleasure sharing ideas with you at the conference. Thank you for your attention, and we look forward to hearing from you.

Trial Defense Service Note

Attacking Stipulations of Fact Required by Pretrial Agreements

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Does this scenario sound familiar? Captain Jones, a trial defense counsel at Fort Blank, has finally negotiated what he believes to be a reasonable pretrial agreement for Sergeant Low. Sergeant Low has been charged with committing indecent acts and oral sodomy with his neighbor's eleven-year old daughter, Andrea. The maximum punishment is a dishonorable discharge, confinement for twenty-seven years, total forfeitures, and reduction to Private E–1. Captain Jones proposed an agreement whereby Sergeant Low would plead guilty to both charges and specifications and in return the convening authority would agree to approve only so much of the adjudged sentence as provided for a dishonorable discharge, confinement for eight years, total forfeitures, and reduction to Private E–1. As with most pretrial agreements today, Sergeant Low also agreed to enter into a stipulation of fact with the government. Simply stated, the staff judge advocate's policy is "no stipulation of fact, no deal."

The convening authority is expected to approve the pretrial agreement, and Captain Smith, the trial counsel, has come to Captain Jones' office with a draft stipulation of fact. Captain Jones examines the stipulation, which recites in graphic detail Sergeant Low's sexual molestation of Andrea. Then Captain Jones notices language in the stipulation that has never appeared in previous stipulations in similar cases. The troublesome portion of the stipulation reads as follows:

> Most experts believe that children who have been sexually exploited are prone to long-term psychological and emotional problems. These problems frequently involve fear or distrust of men, low self-esteem, and self destructive behavior.
>
> Victims who develop fear or distrust of men often vomit, black out, cry for unknown reasons, or become ill when attempting sexual intercourse. They may suffer from confused sexual identity which often leads to homosexuality.
>
> They may experience a recurring dirty feeling which causes them to bathe or change clothes more frequently. They also may suffer guilt or anxiety which can cause extreme masochism and a search for punishment.
>
> Victims who develop low self-esteem often experience withdrawal or self-isolation, shame and guilt. They often develop fear of failure, fear of making new friends, and fear of rejection or desertion. This may result in suicidal tendencies.
>
> Victims who exhibit self destructive behavior often show decreased school performance. They are prone to having illnesses without physical explanation. They often become promiscuous or fall into prostitution. They are prone to drug and alcohol abuse, and other forms of delinquent behavior.
>
> Psychiatric treatment of Andrea reveals that she is presently suffering from some of these problems, including feelings of guilt, embarrassment, and anger, as a result of the accused's acts. She is presently undergoing treatment for these problems. At present, it is

uncertain what the long term effects of the accused's crimes will be.

Needless to say, Captain Jones wants to avoid stipulating to such unfavorable information, as he correctly perceives that it will inflame the court members on sentencing. What, if anything, can Captain Jones do to assure compliance with the pretrial agreement's requirement to enter into a stipulation of fact and avoid the prejudicial portions of Captain Smith's proposed stipulation?

To devise a strategy, Captain Jones must analyze four areas: stipulations of fact; pretrial agreement provisions; aggravation evidence; and relevancy. As will be seen, no one of these areas alone will likely persuade the staff judge advocate to agree to delete the prejudicial portions of the stipulation. Pointing out the potential for sentencing error raised by a combination of aspects of the aforementioned areas may convince the staff judge advocate to accept a stipulation of fact more palatable to the accused.

Stipulations of Fact

The first thing Captain Jones should do is carefully study Rule for Courts-Martial 811,[1] which is the present rule on stipulations. The rule authorizes parties to make an oral or written stipulation to any fact, the contents of a document, or the expected testimony of a witness; gives the military judge the authority to reject a stipulation in the interest of justice; provides that the military judge must be satisfied that the parties consent to its admission before admitting a stipulation in evidence; and establishes the rules for withdrawing from a stipulation or agreement to stipulate. The most important change in the military law on stipulations is the effect of stipulations of fact. R.C.M. 811(e) states in pertinent part: "Unless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto." It is the binding effect of stipulations of fact, coupled with the authorization of R.C.M. 705 for the accused to agree to a stipulation of fact as part of a pretrial agreement, that has opened up a gold mine for prosecutors and created a minefield for defense counsel. The stipulation of fact drafted by Captain Smith in our scenario shows what a little imagination and aggressiveness can do. In essence, Captain Jones is being required to stipulate that the brief synopsis of unknown experts' statements and opinions from unidentified sources is fact in Sergeant Low's case. Because this is a stipulation of fact, Captain Jones may not rebut anything contained in the stipulation. The military judge may refuse to allow the defense to challenge the stipulation or portions thereof even though some of the material would be inadmissible.[2]

After analyzing R.C.M. 811, it should be apparent to Captain Jones that withdrawal from the agreement to stipulate under 811(d) is not helpful, as that would result in failure to comply with the terms of the pretrial agreement requiring a stipulation of fact. Also, relying on R.C.M. 811(b), which allows the military judge to reject a stipulation of fact in the interest of justice, is at best risky, as it is contingent on the military judge acting sua sponte to raise the issue. If the military judge decides to reject the stipulation, the accused will benefit only if the military judge also holds that the convening authority will remain bound by the pretrial agreement. Therefore, from the standpoint of R.C.M. 811, Captain Jones has two primary courses of action that he can take to avoid the problematic language in the proposed stipulation of fact. First, he should seize the initiative and draft his own stipulation, excluding the unfavorable information.[3] He should incorporate as much of the prosecution's proposed stipulation as possible, including aggravating circumstances. It must be remembered that the government's interests must be respected, if the defense drafted stipulation is to have any chance of being accepted by the staff judge advocate. Stipulations that simply state the minimum facts to support the elements of the offenses will probably be rejected. As will be discussed below, the government may require the accused to stipulate to aggravating circumstances directly relating to the offenses. Second, Captain Jones should offer to stipulate to the expected testimony of the government's experts. This offer would be incorporated into the pretrial agreement, and it would preserve the accused's right to rebut the testimony without jeopardizing the pretrial agreement.[4] The very nature of expert testimony makes it more conducive to stipulations of expected testimony as opposed to stipulations of fact.[5]

Pretrial Agreement Provisions

After Captain Jones examines the general law on stipulations, he must analyze stipulations of fact in the context of pretrial agreements as contemplated by R.C.M. 705 and case law. Prior to promulgation of R.C.M. 705, military appellate courts sanctioned various terms or conditions in pretrial agreements. The requirement for the accused to enter into a stipulation of fact was one such provision receiving judicial sanction.[6] R.C.M. 705(c)(2)(A) formally recognizes the practice by allowing the accused to offer as an additional condition with an offer to plead guilty a "promise to enter into a stipulation of fact concerning offenses to which a plea of guilty . . . will be entered." Unfortunately, neither the rule, the discussion, nor the analysis provides any helpful assistance regarding limitations on the contents of the stipulation. We must look then to the opinions of the military appellate courts, which sanctioned the practice in the first place, to find examples of

[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 811 [hereinafter R.C.M.].

[2] *See* United States v. Taylor, 21 M.J. 1016 (A.C.M.R. 1986) (military judge should not be an arbiter in pretrial negotiations); United States v. Rasberry, 21 M.J. 656 (A.C.M.R. 1985). *See also* Tauber, *Stipulate at Your Peril*, The Army Lawyer, Feb. 1986, at 40. *But see* United States v. Keith, 17 M.J. 1078, 1080 (A.F.C.M.R. 1984, *petition dismissed*, 21 M.J. 407 (C.M.A. 1986) (defense counsel should enter into stipulation of fact, if true, and raise issue of inadmissible matters before the military judge).

[3] Tauber, *supra* note 2, at 40.

[4] *See* R.C.M. 811(e).

[5] *See* Mil. R. Evid. 702. *See generally* S. Saltzburg, L. Schinasi & D. Schleuter, Military Rules of Evidence Manual 588–94 (2d ed. 1986) [hereinafter Saltzburg], and cases cited therein.

[6] United States v. Thomas, 6 M.J. 572 (A.C.M.R. 1978).

proper matters that can be included in stipulations of fact required by pretrial agreements.

Although it was a contested case and did not involve a stipulation of fact, *United States v. Vickers,*[7] is consistently cited by courts regarding proper aggravation evidence in presentence proceedings. In *United States v. Sharper,*[8] the court made the following comment regarding stipulations of fact:

> We have long sanctioned pretrial agreements which compel an accused to stipulate with the trial counsel to the factual basis of the offenses to which he pleads guilty. *United States v. Terrell,* 7 M.J. 511, 513 (A.C.M.R. 1979) (Fulton, S.J., concurring). Such a stipulation, by its very nature, recounts the circumstances surrounding the commission of the offenses and is often, and properly, considered by the trial court not only during the *Care* inquiry but on sentencing.[9]

The court concluded by stating:

> Finally, and most importantly, a comprehensive stipulation of fact promotes a fair and just trial by ensuring that the sentencing authority will consider not just the bare conviction of the accused, but those facts "directly related to the offense for which an accused is to be sentenced so that the circumstances surrounding that offense or its repercussions may be understood. . . ." *United States v. Vickers,* 13 M.J. at 406.[10]

Based on *Sharper's* application of *Vickers,* Captain Jones can argue that a stipulation of fact should be limited to the facts and aggravating circumstances directly related to the offense to which the accused offers to plead guilty.

About ten months after its *Sharper* opinion, the Army Court of Military Review, in *United States v. Marsh,*[11] held that the military judge did not err by admitting and considering a stipulation of fact in a guilty plea case that contained evidence of uncharged misconduct explanatory of one of the offenses to which the accused had pleaded guilty. The court cited *Sharper* as the basis for requiring "an accused, pursuant to a pretrial agreement, to stipulate to the aggravating circumstances of which he has been found guilty."[12] Further, the court stated:

> In the absence of a clear violation of the United States Court of Military Appeals' holding in *Vickers, supra,* all parties should understand and respect the decision of the parties to the agreement as to what facts and circumstances are necessary to make appropriate authorities understand the offense or its repercussions.[13]

Although *Marsh* slightly expanded what the government can require in a stipulation of fact, it provides additional support for the argument that the stipulation of fact should be limited to the facts and aggravating circumstances directly related to the offense to which the accused offers to plead guilty.

Aggravation Evidence

It is now appropriate to examine the area of proper aggravation evidence in more depth. R.C.M. 1001(b)(4), which reflects the *Vickers* interpretation of paragraph 75*b*(3), Manual for Courts-Martial, United States, 1969 (Rev. ed.), provides:

> (4) Evidence in aggravation. The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

The discussion following the section sheds additional light on the scope of evidence in aggravation. It states in pertinent part:

> Evidence in aggravation may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.[14]

This language is similar to that in Federal Rule of Criminal Procedure 32(c)(2)(C) regarding presentence reports. Such evidence is no doubt what the *Vickers* opinion would call "repercussions."

Applying R.C.M. 1001(b)(4) to Captain Smith's proposed stipulation in Sergeant Low's case, the first four paragraphs of the proposed stipulation are non-specific and purely speculative as they relate to Andrea. There is absolutely no evidence that Andrea will become a homosexual, a prostitute, a drug abuser, or commit suicide because of the accused's offenses, as suggested by the first four paragraphs of the proposed stipulation of fact. Presumably, if Andrea displayed any of these tendencies, the psychiatrist who examined her would have said so in his reports. Instead, the psychiatric treatment of Andrea disclosed "feelings of guilt, embarrassment, and anger." Arguably, therefore, the prosecution's evidence in aggravation insofar as the psychological effects on the victim of the accused's offenses should be limited to what the specific psychiatric treatment of Andrea revealed.[15] Accordingly, if Captain Jones cannot convince the trial counsel to enter into a stipulation of expected testimony of the psychiatrist who

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[7] 13 M.J. 403 (C.M.A. 1982).

[8] 17 M.J. 803 (A.C.M.R. 1984).

[9] *Id.* at 806.

[10] *Id.* at 807.

[11] 19 M.J. 657 (A.C.M.R. 1984).

[12] *Id.* at 661.

[13] *Id.*

[14] R.C.M. 1003(b)(4) discussion.

[15] *See* United States v. Schreck, 10 M.J. 563 (A.F.C.M.R. 1980).

treated Andrea that could be rebutted, he might wish to offer to stipulate to the following language:

> Dr. Timothy Andrews, a civilian psychiatrist at Fort Blank Army Hospital, has examined and treated Andrea on five occasions since the incident was reported. His examination of Andrea reveals that she is suffering from feelings of guilt, embarrassment, and anger as a result of the accused's acts. She is presently undergoing treatment for these problems. At present, Dr. Andrews is uncertain what the long term effects of the accused's crimes will be.

The above language would be a good compromise, and there is room for the prosecution to add more details concerning Dr. Andrews' treatment of Andrea, as well as an explanation of his diagnosis.

Relevancy

If all of Captain Jones' pretrial efforts to this point fail, he will have to agree to enter into the stipulation of fact as proposed by Captain Smith or lose the pretrial agreement. As already seen, he cannot rebut the stipulation of fact under R.C.M. 811(e), and the facts as stipulated are binding on the court-martial. Nevertheless, the mere existence of a stipulation of fact does not make it relevant under Mil. R. Evid. 401. Also, even if the material is relevant, its probative value may be substantially outweighed by the danger of unfair prejudice to Sergeant Low under Mil. R. Evid. 403. Although the military judge may decline to hear a motion as to the admissibility of the stipulation of fact,[16] by objecting to portions of the stipulation on relevancy grounds, Captain Jones should be viewed as still complying with the pretrial agreement's requirement for a stipulation of fact. He remains bound by the facts, and he is not trying to rebut any fact in the stipulation. Instead, he is seeking to have the military judge exclude from consideration on sentencing irrelevant portions of the stipulation of fact, as well as those portions whose probative value is substantially outweighed by the danger of unfair prejudice to the accused under Rule 403. He should argue that Rules 401, 402, and 403 act as governors on the admissibility of stipulations. Otherwise, parties to a stipulation could bind the court-martial to all kinds of matters that may or may not be relevant, and the court would be frustrated in its effort to reach an accurate and fair result.[17]

Captain Jones will find substantial support for his relevancy argument in *U.S. v. Snodgrass.*[18] The Army court held testimony as to the general effects of sexual abuse inadmissible for sentencing purposes, but permitted introduction of testimony as to the effects on the particular victim. Captain Jones should be able to argue that a similar limitation should be imposed on this stipulation.[19]

If the military judge rules that the questioned material is relevant and admissible under Mil. R. Evid. 402, Captain Jones should argue that the material should be excluded under Rule 403, which provides in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members." Because expert opinion has an "aura of special reliability and trustworthiness,"[20] the danger of unfair prejudice presented by the stipulation in Sergeant Low's case is obvious. Terms such as "suicidal," "prostitution," "masochism," and "homosexuality" are likely to inflame the court. They are especially misleading and confusing in Sergeant Low's case, because psychiatric examination of Andrea revealed significantly less drastic problems, such as "feelings of guilt, embarrassment, and anger." Also, the brief statement of Andrea's diagnosis is virtually buried beneath the rather substantial synopsis of expert findings in unidentified studies involving victims of sexual offenses. By the time the members hear the actual diagnosis, they will be so inflamed and prejudiced against Sergeant Low that they will be paying very little attention to it. The whole matter is exacerbated by the fact that if Captain Jones is unsuccessful in convincing the military judge to exclude the objectionable material, the court members are going to view the stipulation of fact as gospel, because the defense cannot rebut any of the matters contained therein.

Finally, in order to preserve the issue on appeal, as well as to ensure that the military judge applies the balancing test contemplated by Rule 403, the defense counsel should request special findings. Military judges should honor the request.[21]

Conclusion

It is hoped that defense counsel will be able to use some of the ideas suggested in this article. Counsel must not allow the successful negotiation of a highly favorable sentence limitation to become an excuse for rubberstamping whatever the government wishes to place in a stipulation of fact. Instead, counsel should aggressively pursue a fair stipulation of fact in the case. The stipulation should be comprehensive and include the types of aggravation evidence that courts have determined to be appropriate for sentencing under R.C.M. 1001. At the same time, counsel must strongly oppose inclusion of matters that are highly speculative, inflammatory, and not directly related to the offense, such as those depicted in Sergeant Low's case.

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[16] *See supra* text accompanying note 2; Gaydos, *A Prosecutorial Guide to Court-Martial Sentencing,* 114 Mil. L. Rev. 1, 16–18 (1986). Defense counsel should argue that the military judge, rather than counsel, should decide the admissibility of evidence. The approach was urged by the Air Force Court of Military Review in United States v. Keith, 17 M.J. 1078, 1080 (A.F.C.M.R. 1984), *petition dismissed,* 21 M.J. 407 (C.M.A. 1986).

[17] *See* Saltzburg, *supra* note 5, at 339.

[18] 22 M.J. 866 (A.C.M.R. 1986).

[19] *See also* United States v. Harris, 18 M.J. 809 (A.F.C.M.R. 1984).

[20] United States v. Hicks, 7 M.J. 561, 566 (A.C.M.R. 1979).

[21] Saltzburg, *supra* note 5, at 345.

Army Court of Military Review—FY 86

Of 2,394 new records of trial processed by the Clerk of Court in FY 86 (an average of approximately 200 per month), 2,177 GCM and BCDSPCM records (90.9%) were referred to the Army Court of Military Review for review under Article 66, UCMJ, while 106 GCM records (4.4%) were referred to the Examination and New Trials Division for examination pursuant to Article 69(a). The remaining 111 records (4.6%) were GCM cases resulting in acquittal and 4 BCDSPCM cases in which appellate review had been waived.

Altogether, 2,321 cases were referred for review by the court in FY 86. Besides 2,177 new cases, there were 43 cases remanded by the Court of Military Appeals for further review, 93 cases returned to the court following ordered further proceedings at the trial or convening authority level, 7 petitions for extraordinary relief, and 2 government appeals under Article 62.

In sixteen cases (.7%) the accused waived representation by appellate counsel, but in five of those cases the court directed appointment of counsel, usually to assist in determining the validity of the waiver.

The Army court disposed of 2,645 cases during the year, including eight cases in which the decision was reconsidered sua sponte or on petition of a party. Oral argument was heard in sixty-six cases. Decisions in 131 cases (5%) were announced in published opinions. Memorandum, or unpublished, opinions were issued in 539 cases (20.4%). The remaining 1,972 cases (74.6%) were disposed of by short-form affirmance (decision without opinion) or by an order (Some 60% of the cases considered by the court were submitted without assignment of error.). Included in the cases disposed of by order were seven appeals withdrawn by accused and two cases in which the proceedings were abated ab initio when the accused died before appellate review was complete.

Court-Martial Processing Times

After some delay occasioned by conversion between old and new data bases, court-martial processing times have been calculated for the fourth quarter, fiscal year 86. Army-wide average processing times for general courts-martial and bad-conduct discharge special courts-martial are shown below.

General Courts-Martial

	4th Qtr	FY 86
Records received by Clerk of Court	355	1534
Days from charges or restraint to sentence	47	48
Days from sentence to action	49	52

BCD Special Courts-Martial

	4th Qtr	FY 86
Records received by Clerk of Court	190	871
Days from charges or restraint to sentence	34	33
Days from sentence to action	50	47

Contract Appeals Division Trial Notes

Exercise of Option Years

Lieutenant Colonel Michael J. Wentink
Contract Appeals Division

In December 1985, Contract Appeals Division received an appeal by Continental Page Services, Inc. (Contel) against the Army's exercise of the third option year of a firm fixed price contract for the operation and maintenance of certain telephone systems. Contel had performance problems with the contract and, overall, it found the contract to be a losing proposition. Contel wanted out—although, it was perfectly willing to perform the final three years of this $10 million contract at cost plus a fixed fee.

The contracting officer directed Contel to continue to perform and advised that the government would only accept Contel's invoices if submitted according to the fixed price schedule.

A review of the case by the Contract Appeals trial attorneys, disclosed some serious concerns. First, notwithstanding that the exercise of option years is an unilateral right of the government, the contracting activity attempted a *bilateral* exercise by sending Contel an unsigned modification requesting signature and return by the contractor. The date that the bilateral modification was received by Contel would have been timely for purposes of exercising the option. Contel refused to sign it, however, and therefore, the contracting officer issued an unilateral modification—*but*, this unilateral modification was made and received after the time for exercising the option year.

The second concern was that both the bilateral and unilateral attempts to exercise the option years contained the subject to availability of funds clause. At first blush, we were faced with another in a series of recent government losses involving this same issue. The rule is that an option is the contractor's offer couched in specific terms and acceptance must be unconditional and in exact accord with these

terms. A number of cases have found the subject to availability of funds clause to be an impermissible condition on the exercise of an option. As a result, contractors have been able to walk away from contracts that they no longer liked. It looked like Contel might be able to walk away from its contract because of the manner in which the contracting officer attempted to exercise the option.

The trial attorneys aggressively tried and briefed the case and, notwithstanding the negative aspects, won the case.[1]

The board viewed the transmission of the unsigned bilateral modification to the contractor as a timely exercise of the option. Reading the cover letter (signed by the contracting officer) together with the enclosed modification form, the board found a clear exercise; the letter was a writing of the contracting officer and the appended document (an unsigned modification form in this case; it could have been an unsigned statement) made it clear that the contracting officer was exercising the government's option.

As to the contingency to the exercise (the subject to availability clause), the board found that its inclusion in this case did not render the exercise ineffective because the contract contained this same contingency. Therefore, the exercise was definite. The option clause allows the contract, not the contract minus the availability of funds clause, to be renewed. The board referred to the precedent of *Lockheed Electronics Co., Inc.*[2]

Two lessons follow from this decision. First, ensure that contracts with option years contain the subject to availability of funds clause. Second, exercise options timely (meaning that the contractor receives the exercise within the time stated) and unilaterally. Anything else creates issues and, next time, it might be decided in favor of the contractor who wants out of a bad deal—that might well be a good deal for the Army.

[1] Contel Page Services, Inc., ASBCA No. 32100 (25 Nov. 1986).

[2] ASBCA No. 16667, 72-1 B.C.A. (CCH) para. 9442.

The *Fulford* Doctrine and Progress Payments

Major David L. Fowler
Contract Appeals Division

A recent decision[1] by the Armed Services Board of Contract Appeals seems to limit application of the *Fulford*[2] doctrine.

Mactek involved the termination for default of a supply contract and the subsequent demand for unliquidated progress payments. In the final decision that terminated the contract, the contracting officer (KO) noted the amount of progress payments owed by the contractor and cited DAR § 7-104(b)[3] (Progress Payments for Small Business Concerns) as authority for the anticipated demand for their return. Twenty-six days later, the KO issued a second final decision demanding the return of the progress payments. The contractor failed to appeal the termination within ninety days of the first final decision. Rather, it filed a consolidated appeal after receiving the demand letter, attempting to contest the propriety of the default termination as well as the demand for progress payments.

The government filed a motion to dismiss so much of the appeal as concerned the default termination for lack of jurisdiction. In its motion, the government argued that the board lacked jurisdiction as to the propriety of the default termination because the contractor failed to file its appeal within the prescribed ninety days from receipt of the termination notice. Further, the government argued that the so-called *Fulford*[4] doctrine should not apply to cases involving demands for progress payments, as opposed to cases involving excess reprocurement costs.

In granting the government's motion, the board focused on the finality afforded KO's final decisions under the Contract Disputes Act,[5] and on the language of DAR § 7-104.35(b). The board emphasized that the *Fulford* doctrine was the result of an attempt to resolve a conflict between the "default" clause and the "disputes" clause, and it simply was not applicable in cases where the KO's actions were based upon another clause in the contract, such as DAR § 7-14.35(B). More importantly, the board felt that to "open-up" the default termination for review, it would be forced to overlook or ignore the statutorily mandated ninety day filing period as it applies to the board's jurisdiction.

It is unclear how far the board will go in adhering to its decision in *Mactek*, but contract attorneys and procurement advisors should consider the case when advising their clients. Ensure that the appropriate progress payments clause appears in full text in contracts whenever applicable and that default termination notices contain the amount of unliquidated progress payments whenever possible.

[1] Mactec Indus. Corp., ASBCA No. 33277 (24 Oct. 1986).

[2] Fulford Mfg. Co., ASBCA Nos. 2143, 2144, 6 CCP (CCH) para. 61,815 (20 May 1955).

[3] Defense Acquisition Reg. § 7-104(b) (1 July 1976) [hereinafter DAR].

[4] The *Fulford* doctrine states that a timely appeal of a final decision assessing excess reprocurement costs will also support litigation of the propriety of the underlying default termination—even if the termination was not appealed within 90 days.

[5] 41 U.S.C. §§ 601-618 (1982).

Small Business Set-Aside Contract Voided Because Contractor Wrongfully Certified Himself as Small

Major Daniel R. Allemeier
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A unique opportunity awaits a contractor qualifying as a small business on a government contract. Contracts set aside for small businesses are awarded in an environment of reduced competition. Even if a larger contractor could do the job cheaper and do it better, the larger contractor cannot properly bid on a set-aside contract. A contractor qualifying as a small business, therefore, can expect that its prices will be more competitive and that it will have enhanced opportunities to be awarded a government contract.

To qualify as a small business concern, a contractor must evaluate its size and certify that it meets the size standards specified in the contract. If the contractor wrongfully self-certifies its small business status and is ultimately awarded the contract, it not only gets the benefit of a contract to which it is not entitled, it also denies a small business competitor the advantage envisioned by the Small Business Act.[1]

Self-certification, therefore, is no insignificant requirement to be taken lightly. The Armed Services Board of Contract Appeals (ASBCA) in a recent decision demonstrates this quite forcefully when it voided a contract for wrongful certification.[2] By characterizing as "clearly illegal" a contract awarded after a tainted certification, it denied recovery to the contractor.

The Competitive Environment

By way of putting the self-certification requirement into context, some statistical information is illustrative. The Fiscal Year 1986 Department of Defense (DOD) budget[3] was $265.8 billion.[4] Of that amount, nearly $155 billion[5] was awarded for supplies, projects and activities procured under government contracts. The small business share[6] of that amount was about $20 billion.[7]

The percentage of the annual budget allotted to small business set-aside contracts is not fixed. There is, however, a statutory preference for a "fair proportion" of the total purchases and contracts to be set aside.[8] This preference is given meaning by the Small Business Act. The Department of Defense, for example, must submit a monthly report to the President and the Congress explaining how it is distributing its funds between small and other businesses.[9] The Small Business Administration (SBA) also renders an annual report on all federal expenditures.[10] Further, federal agencies, working with the SBA, must establish goals for small business participation in its procurement contracts having a value of $100,000 or more.[11] Agencies failing to meet the established goals must, at the end of fiscal year, justify that failure.[12]

Given the total dollars awarded to small businesses and the considerable motivation to give a "fair proportion" to small businesses, the competition for these dollars is substantial. What is also substantial is the temptation for a middle-sized to large-sized concern to seek ways of capturing that business.

Self-Certification

Rather than create a bulky organization and invent a costly system for investigating the small business qualifications of previously unqualified businesses—prior to

[1] 15 U.S.C. §§ 631–649d (1982); originally enacted in 1953, 67 Stat. 232; permanent legislation enacted in 1958, Pub. L. No. 85–536, 72 Stat. 384.

[2] Greg Pelland Construction, ASBCA No. 31128 (14 Aug. 1986).

[3] DOD is not the only department of government that contracts work out. It is a major spender, however, and is a reasonable barometer for comparison to total outlays of the entire federal budget which, for 1986, was estimated at $979.9. billion. The Budget of the United States Government, Department of the Defense Extract For Fiscal Year 1987 219 (Summary Tables).

[4] Estimated outlay in current (1986) prices. *Id.*

[5] The amount is based on a projection of the fiscal year total, taken from first half of fiscal year 1986 statistics. DOD procurement awards during the first half of FY 1986 were $77,503 million. Using FY 1985 statistics as a guide, the $83,653 million awarded for the first half of FY 1985 was slightly more than half of the total ($163,725 million) awarded in FY 1985. Thus, the $77,503 million for the first half of FY 1986 can be expected be just more than half of the total awarded for FY 1986. Department of Defense Prime Contract Award, First Half of Fiscal Year 1986 3 and Department of Defense, Prime Contract Awards, Fiscal Year 1985 3.

[6] Small businesses often also qualify for low interest loans (15 U.S.C. § 636(a) (1982)) and other assistance, *i.e.*, technical and managerial expertise (15 U.S.C. § 636(j) (1982)) which increase the total income available to a small business contractor.

[7] *See supra,* note 5, for source of data and method of projection of first half fiscal year outlay to total fiscal year. This figure reflects only the value of contracts awarded directly to small business contractors. It does not include the very sizeable amount of money flowing through subcontracts awarded to small businesses by large government contractors under the aegis of Public Law 95–507. For FY 1985, small businesses accounted for $20 billion in sub-contracts from DOD contractors. *See* Companies Participating in the Department of Defense Subcontracting Program, Fiscal Year 1985 6. Under P.L. 95–507, large contractors promise to give small contractors the "maximum practicable opportunity to participate in the performance of" federal contracts. 15 U.S.C. § 637(d) (1982).

[8] *See* 15 U.S.C. §§ 631(a) and 644(a) (1982); 10 U.S.C. § 2301 (1982); 41 U.S.C. § 252(b) (1982). *See also* 50 U.S.C. app. §§ 468(a) and 2163a(f)(2) (1982).

[9] 15 U.S.C. § 639(d) (1982). It has been recognized that the competitive environment in which small businesses operate is not the competition of large businesses against small but middle-sized concerns against small concerns. *See* 13 C.F.R. § 121.3–1(b)(2) iii (1982) (subsequently revised).

[10] 15 U.S.C. §§ 639(a) and 644(h) (1982).

[11] 15 U.S.C. § 644(g). For contracts less than $10,000, small business concerns already have a mandatory set-aside, provided two or more such concerns are able to compete for the award. 15 U.S.C. § 644(j) (1982).

[12] 15 U.S.C. § 644(h) (1982).

allowing them to compete for small business set-aside contracts—a system of self-certification was selected.[13] In return for the opportunity to bid on a contract in this atmosphere of limited competition, small business contractors are obligated to determine their own small business status and to certify that they qualify as small business concerns. The required certification under the Federal Acquisition Regulation is as follows:

Small Business Concern
Representation (May 1986)

The offeror represents and certifies as part of its offer that it —— is, —— is not a small business concern and that —— all, —— not all end items to be furnished will be manufactured or produced by a small business concern in the United States, its territories or possessions, Puerto Rico, or the Trust Territory of the Pacific Islands. "Small business concern," as used in this provision, means a concern, including its affiliates, *that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts,* and qualified as a small business under the size standards in this solicitation.[14]

Self-certification is not a talisman to be invoked by contractors hoping to act with impunity. Competitors of a contractor bidding on a small business set-aside contract can protest the self-certification and request an SBA size determination.[15] The contracting officer can also seek a size determination after bid opening.[16] Nevertheless, if there is no protest, the contracting officer can accept and rely upon the self-certification as proof that the contractor is small.[17]

The ASBCA's Decision

Facts

Greg Pelland Construction was a sole proprietorship in late 1982. The company did basic construction work primarily as a subcontractor. In January 1983, Greg Pelland was approached by an officer of C.S.S. Corporation. This officer proposed that Greg Pelland bid on a solicitation the officer expected the Government to issue, and that Greg Pelland use C.S.S. Corporation's assets to do the work. Greg Pelland understood that the solicitation would cover contract services to provide portable toilets to Fort Lewis, Washington.

C.S.S. Corporation and its affiliates were collectively a large business. They were affiliated by interlocking directorates, common corporate officers, and shared facilities. The large corporation was created by one of its affiliates for the specific purpose of going into the portable toilet business. Greg Pelland viewed C.S.S. Corporation and its affiliates as one company.

In December 1982, officers of C.S.S. Corporation learned that the 1983 Fort Lewis portable toilet contract would be set aside for small businesses. Prior contracts had not been set aside for small businesses. The officer of C.S.S. Corporation told Greg Pelland that he was being considered to do the job because C.S.S. Corporation anticipated that it would be unable to qualify as a small business.

On January 14, 1983, the very day the government issued the solicitation announcing the set-aside for small businesses, C.S.S. Corporation's officer and Greg Pelland entered into a formal written arrangement to do the work described in the Fort Lewis solicitation. The arrangement required Greg Pelland, if he was awarded the contract, to use C.S.S. Corporation on all work required by the Fort Lewis contract. For his part, Greg Pelland would receive seven percent of the gross proceeds from the work.

On 14 February 1983, Greg Pelland submitted his bid, which was prepared by officers of his large business affiliate. The bid included the self-certification by Greg Pelland stating that he was legally qualified as a small business in accordance with guidance provided in the solicitation.[18]

Because Greg Pelland was new to the portable toilet business and had no prior history of doing this kind of work, the contracting personnel at Fort Lewis asked Greg Pelland to explain how he expected to perform the work. In his initial response, Greg Pelland stated that he expected C.S.S. Corporation to do "the major portion" of the work.[19]

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[13] *See* 13 CFR §§ 121.5(a) and (e) (1986); Federal Acquisition Reg., § 19.301 (1 Apr. 1984) [*hereinafter* FAR].

[14] FAR § 52.219–1 (emphasis added). The two phrases emphasized are derived directly from the Small Business Act, 15 U.S.C. 632(a) (1982).

[15] "Any bidder or offeror or other interested party may challenge the small business status of any other bidder or offeror on a particular government procurement or sale." 13 CFR § 121.9(a) (1986); *accord* FAR § 19.302(a).

[16] 13 CFR § 121.9(a) (1986); FAR § 19,302(b). Unlike a competitor, the contracting officer may seek a size determination even after award of the contract.

[17] 13 CFR § 121.5(e) (1986); FAR § 19.301(b).

[18] The specific contract provisions were not quoted *in toto* in the ASBCA's decision but were identified by Defense Acquisition Regulation and citations. *Greg Pelland,* slip op. at 2. The complete text of the cited provisions are as follows:

Paragraph 14 of SF 33–A states:

14. SMALL BUSINESS CONCERN. A small business concern for the purpose of Government procurement is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is submitting offers on Government contracts, and can further qualify under the criteria concerning number of employees, average annual receipts, or other criteria, as prescribed by the Small Business Administration. (See Code of Federal Regulations, Title 13, Part 121, as amended, which contains detailed industry definitions and related procedures.)

NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE (1972 JUL) (DAR 7–2003.2). (a) *Restriction.* Offers under this procurement are solicited from small business concerns only and this procurement is to be awarded only to one or more small business concerns. This action is based on a determination by the Contracting Officer, alone or in conjunction with a representative of the Small Business Administration that it is in the interest of maintaining or mobilizing the Nation's full productive capacity, in the interest of war or national defense programs, or in the interest of assuring that a fair proportion of Government procurement is placed with small business concerns. Offers received from firms which are not small business concerns shall be considered nonresponsive and shall be rejected.

(b) *Definition.* A "*small business concern*" is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is offering on Government contracts and can further qualify under the criteria set forth in regulations of the Small Business Administration (code of Federal Regulations, Title 13, Section 121.3–8). In addition to meeting these criteria, a manufacturer or a regular dealer submitting offers in his own name must agree to furnish in the performance of the contract end items manufactured or produced by small business concerns: *Provided* that this additional requirement does not apply in connection with construction or service contracts.

[19] *Greg Pelland,* slip op. at 3.

The contracting officer made preliminary inquiries of the SBA regarding the appropriateness of a small business hiring a large business to do most of the work on a set-aside contract. When told by the SBA that there was no prohibition against subcontracting with a large contractor—at least for some of the work—contract personnel at Fort Lewis asked Greg Pelland to explain further whether or not his large corporation subcontractor was going to do all of the work. In response, Greg Pelland said only that C.S.S. Corporation would provide "most of the latrine services" but that Greg Pelland would provide "the employees to do the work during peak summer periods or would personally do the excess work."[20]

No further inquiry was made and Greg Pelland was awarded the contract for Fort Lewis. During performance of the Fort Lewis contract, Greg Pelland used a C.S.S. Corporation employee to do the work, used only this large corporation's trucks and materials, and did nothing but act as a conduit for messages and payments, keeping seven percent of the gross proceeds as per the agreement. Throughout all relevant periods, Greg Pelland had no plan to purchase equipment to run the business himself.

In August 1983, the Fort Lewis contracting office issued another solicitation for portable toilet services. This one was in support of a one month field training exercise at the Yakima Firing Range in eastern Washington State. Greg Pelland and the officer for C.S.S. Corporation agreed to use the previous arrangement to govern their respective rights and duties when responding to the Yakima solicitation. Greg Pelland submitted a bid, again certifying himself as small. The bid was again assembled by the C.S.S. Corporation's officers and Greg Pelland agreed with what these officers proposed.

Greg Pelland was awarded the Yakima contract; an employee on loan from C.S.S. Corporation performed the work, using C.S.S. Corporation materials and equipment; and when the work was done, C.S.S. Corporation submitted invoices on behalf of Greg Pelland for the work. At the conclusion of the contract, Greg Pelland demanded additional compensation for extra work he claimed was performed at Yakima. The claim was denied by the contracting officer and was the basis for the appeal to the ASBCA.

When the final decision denying Greg Pelland's claim for the work was appealed to the ASBCA, the government defended on the merits of the claim and raised for the first time the defense of illegality based upon the wrongful award of the Yakima contract to Greg Pelland.

In December 1983, another solicitation was issued for portable toilet services at Fort Lewis. This solicitation covered expected requirements for 1984. A competitor to Greg Pelland protested to the contracting officer, demanding a size determination. The contractor charged that Greg Pelland was affiliated with C.S.S. Corporation. The SBA investigated the competitor's allegation, determined that Greg Pelland was indeed affiliated with the large corporation, and concluded that C.S.S. Corporation was large under the Small Business Act.

The Decision

The ASBCA also concluded that C.S.S. Corporation and its affiliates were large and that Greg Pelland was affiliated with C.S.S. Corporation through a "joint venture" arrangement. For the board, "the controlling role" of the large contractor in "the proposal for and performance of" the Yakima contract was significant in its joint venture determination.[21] The ASBCA believed that direct contractual liability of the large corporation to the government was inconsequential.[22]

Under the circumstances, award of the contract to Greg Pelland was clearly illegal and the illegality should have been clear to Greg Pelland at the time. Significant to this determination was the citation to the Defense Acquisition Regulations and the SBA Regulations contained in the contract. Both the contract and those regulations defined a small business concern. They required Greg Pelland to correctly determine whether he qualified as a small business before claiming small business status. When Greg Pelland did not do so, under circumstances that should have put him on notice that he did not qualify, the ASBCA determined that the contract was clearly illegal and it voided the contract.

The ASBCA relied upon the United States Court of Claims decision in *John Reiner & Co. v. United States*[23] for the standard to determine when voiding an executed contract is appropriate. In *John Reiner,* the Court of Claims recognized that voiding a contract, executed in whole or in part, is a strong remedy that ought not be casually applied. Declaring a contract void should occur only when award of the contract is clearly illegal.[24] Thus, in *John Reiner,* a failure by the government to comply with its regulations requiring the contracting officer to adequately inform offerors of the extent to which the element of delivery would affect the potential for award was not so "clearly illegal" as to void the contract. The ASBCA's decision in *Greg Pelland* recognized that this high standard should be met

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[20] *Id.*

[21] *Id.* at 5.

[22] Pelland argued that the large contractor was not contractually liable to the government for performance. If C.S.S. Corporation reneged on its arrangement with Greg Pelland, he would be liable to perform all the work.

[23] 163 Ct. Cl. 381, 325 F.2d 438 (1963), *cert. denied,* 377 U.S. 931 (1964).

[24] *Id.* at 386–87, 325 F.2d at 440.

before a contract is declared void, but found that Greg Pelland's actions clearly overstepped the line.[25]

The ASBCA concluded: "The illegality of the award being clear, the contract is void. There can be no recovery for additional jobs under . . . [the contract's] terms, and no valid implied-in-fact contract on the same facts."[26]

The Impact of the Decision

The significant points of the *Greg Pelland* decision are: that the solicitation[27] required the contractor claiming small business status to ensure that its status is correct; and that if the contractor is wrong and it is clear, or should be clear, that the contractor is large, then declaring a contract void is a proper remedy. The decision also recognizes that voiding a contract is a remedy available to the government in addition to those available under the regulations.[28]

Contractors Must Carefully Scrutinize Their Business Relationships and Prudently Decide That They Qualify as a Small Business Before Certifying

As earlier noted, the method of self-certification is both a significant obligation and a significant temptation, given the enhanced opportunities for profit and the reduced competition. A contractor close to the line with respect to qualifying as a small business must analyze its own ethical standards as those standards related to its desire to compete for business and make a profit. When a contractor certifies, it must do so correctly.

The SBA regulations and Small Business Act emphasize "control" and the "power to control." Actual control is not necessary; the potential for control is sufficient. While the formalities regarding the law of business associations are some evidence of a large concern's ability to control an erstwhile small business, they are not determinative. A contractor must look to the regulations for guidance, not with an eye to finding a loophole, but with the intent of finding criteria to apply to its own situation.

Although not discussed in the ASBCA's decision, a series of Comptroller General decisions are helpful in understanding the approach the small contractor must take in ascertaining its size. These decisions hold that the self-certification should be made "in good faith."[29] "[T]he test of good faith in the context of self-certification by a small business of its size status is one of a high degree of prudence and care. See 51 Comp. Gen 595 (1972)."[30] This standard of good faith means that the contractor has failed to properly self-certify if it has been either intentionally or negligently at fault with respect to its status.[31] This standard conforms to the outcome in *Greg Pelland.* Although not expressly used by the ASBCA in its decision, it could have been cited without altering the ASBCA's conclusions.

Declaring a Contract Void is Justified When Improper Certification is Discovered.

The most significant aspect of the *Greg Pelland* decision, of course, is that the contract award was held to be clearly illegal because Greg Pelland certified wrongly. The decision focuses on the contract terms that put the contractor on notice of the size standards that apply and that advise the contractor of the SBA regulations. These regulations give substance to and expand upon the statutory phrase, "power to control."[32] Having been put on notice and advised of the standards that apply, a contractor must make a good faith effort to determine its size.[33] The test being applied is an objective one. The contractor is charged with knowing whether or not it is small within the meaning of the Small Business Act when the facts are such that the contractor should have known its status. The ASBCA does not find actual knowledge of one's qualifications as controlling or necessary. Given the obligation or duty to ascertain ones' small business status correctly, the board imposes a reasonable person standard to the facts known by the contractor. Thus, if the contractor is negligent about its status when a reasonable person would have concluded that the contractor was other than small, the contractor is held to have known that he was not small.

For the truly small contractor, the difficult aspect of this analysis is that a small business will sometimes have a large corporate "sponsor" or "big brother." When this occurs, the small concern must take care not to allow control to slip away. This may appear to be difficult for a contractor new to a particular business with limited competence in bidding government contracts and limited experience in performing particular contract work. It is just this contractor who must be wary of the *Greg Pelland* decision because

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[25] *Greg Pelland,* slip. op. at 6. The ASBCA also rejected Greg Pelland's argument that the governmental action precluded or estopped the government from asserting illegality. In rejecting this argument, the ASBCA acknowledged that the government, prior to award of the 1983 Fort Lewis contract, questioned Pelland's small business status, and told Pelland that a small business could subcontract with a large contractor. Regarding the former government action of questioning Pelland's status, the ASBCA noted that the duty to correctly determine the status was on Pelland. The burden of doing so could not be shifted to the government simply because government personnel made inquiries. Respecting the latter government action of advising Pelland that a small business could subcontract with a large business, the ASBCA noted that Greg Pelland did not make full disclosure of his arrangement with C.S.S. Corporation, particularly his written agreement to subcontract all of the work to the large contractor. Apparently, advice of the kind the government gave, when based on insufficient knowledge, should not estop the government when the contractor is the cause of the insufficient knowledge.

[26] *Id.*

[27] It would appear that the FAR and SBA regulations themselves require proper self-certification. *See supra* notes 13 and 14. Because they are mandatory provisions for set aside contracts, they ought to be included as a matter of law. G. L. Christian & Assoc. v. United States, 160 Ct. Cl. 1, 312 F.2d 418 reh'g denied, 163 Ct. Cl. 595, 320 F.2d 345, *cert. denied,* 375 U.S. 954 (1963). The board made no express determination on the matter, however.

[28] Contractors who are denied award of the contract due to wrongful certification may have a cause of action sounding in tort law. Iconco v. Jensen Constr. Co., 622 F.2d 1291 (8th Cir. 1980).

[29] Comp. Gen. Dec. B–182926 (2 Jan. 1976), 76–1CPD para 1; Ms. Comp. Gen. B–174807 (23 Mar. 1972); 41 Comp. Gen. 47 (1961).

[30] Comp. Gen. Dec. B–182926 (2 Jan. 1976), 76–1 CPD para 1.

[31] Ms. Comp. Gen. B–174807 (23 Mar. 1972).

[32] *See* 13 CFR § 121.3(a) and (c) (1986).

[33] FAR § 19.301(a).

control of both the proposal and the performance[34] stages were significant in Greg Pelland's demise.[35]

These concerns notwithstanding, this obligation to determine status does not unfairly affect a small contractor; it does not apply as harshly as it may appear at first blush. The small business contractor who is truly interested in viability will not simply respond *a la* Greg Pelland while the large business contractor pulls the strings. Instead, the small business concern will endeavor to improve its competency and learn from the experience gained. The independent small business will control its business. If the small business concern does not and intends merely to reap the benefits of an arrangement, voiding of its contract is clearly appropriate.

Conclusion

While *Greg Pelland* provides a potent remedy, the government should not expect to use it frequently. Even before *Greg Pelland,* a contracting officer could question the size status of a contractor after bid opening.[36] Whenever size is complained of—whether it be by a small business competitor or by the contracting officer—the regulations place the burden of proving the small business status on the contractor that certifies itself as small.[37] The SBA will make a size determination that is binding on the contracting officer.[38] Thus, a significant percentage of questions dealing with certification will be answered prior to award, or closely following award. In most of these instances, the parties would never reach the point of having a contract executed in whole or in part declared illegal.

In the past, the government could cancel a contract tainted with illegality. While this procedure was and is available,[39] it is not recommended by the Claims Court in self-certification cases. Instead, the court has suggested that the better approach would be to terminate the contract for convenience.[40] This approach recognizes the high standard that to void a contract it must be "clearly illegal." It also recognizes potentially meritorious contractor claims that ought not to be dismissed unless the contract clearly merits voidance.

Consequently, while the decision in *Greg Pelland* recognizes a remedy in addition to either the SBA size determination protest procedures or termination for convenience, the contracting officer ought not simply attack the small business status of a contractor every time the performance of a small business contract goes bad. The Court of Claims in *John Reiner* warns that the power to void a contract must be applied only to "clearly illegal" contracts. An agency that seeks voidance of a contract because of wrongful certification may find that it is paying breach of contract damages if it does so wrongfully.

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[34] *Greg Pelland,* slip. op. at 5. Certification naturally precedes performance. The actual performance of the certified contract is only relevant as circumstantial evidence of what the contractor intended when it certified. The relevant points in time for analyzing whether a certification was clearly illegal is at bid submission and at award.

[35] If not affiliated, Greg Pelland would have qualified as a small business. *Greg Pelland,* slip op. at 2.

[36] While this is possible, the best party to ask for a size determination is a competitor. The size determination protestor in the case of Greg Pelland Construction put together a protest package that Greg Pelland could not refute and that was convincing to the SBA examiner.

[37] 13 CFR § 121.8(c) (1986). The point regarding a contractor's burden of proving its size status is significant for two reasons. First, placing the burden of proving status on the self-certifying contractor significantly diminishes both the contracting officer's and small business competitor's burdens when a size determination is requested. Because the self-certifying contractor had the burden of ascertaining its status initially, it is not relieved of that burden once it certifies. If challenged, the self-certifying contractor must come forward with the substantiation it relied upon to certify itself in the first place. The second significant aspect is complementary to the first. The requirement to carry the burden in a size determination protest conforms to the regulatory scheme. Because this obligation to correctly certify in good faith is a significant aspect of the regulatory procedural scheme regarding establishing a contractor's small business status, it follows that the contractor ought to be held to the burden of proving itself small if challenged. Any other result would render the self-certification procedure a sham.

[38] 13 CFR § 121.8 (a) and (d) (1986).

[39] *See, e.g.,* K & R Engineering Co., 222 Ct. Cl. 340, 616 F.2d 469 (1980).

[40] *John Reiner,* 163 Ct. Cl. 381, 325 F.2d 438 (1963), *cert. denied,* 377 U.S. 931 (1964).

Regulatory Law Office Note

Just as issues in a civil tort case can be segregated into issues of liability and issues related to the measure of damages, so can issues in an electric or gas rate case be divided. Revenue requirements issues are those that focus on the overall revenue needs of a utility to provide service to all customers. Rate design issues are those that focus on the specific tariff rates to be paid by specific customers. Contracts between military installations and utilities are normally tied to specific tariffs. Rate matters involving telecommunications companies have issues similar to those discussed in this note, although the note's primary focus involves electric and gas cases.

Most federal and state regulatory commissions have enabling legislation that recognizes that it is the reasonableness of the specific rate that is of primary importance to the consumer. Courts have stated that the burden is on the utility that seeks an increase in rates to establish not only that it requires an overall increase, but that its proposed schedule of rates and rate design are reasonable. *Blackstone Valley Chamber of Commerce v. PUC,* 121 R.I. 122, 396 A.2d 102, 104 (1979); *United States v. Public Utility Commission,* 120 R.I. 959, 393 A.2d 1092 (1978).

Rates are properly prescribed when the proposed rates accurately reflect variations in the cost of serving different rate classes. *In Re Central Railroad of New Jersey,* 66 N.J.

12, 327 A.2d 427 (1975); *Lefkowitz v. PSC*, 40 N.Y.2d 1047, 360 N.E.2d 918, 919, 392 N.Y.S.2d 239 (1976); *Townships of Mahoning County v. Ohio PUC*, 58 Ohio St. 40, 388 N.E.2d 739, 745 (1979). Courts have on occasion permitted state regulatory commissions to consider factors other than cost in setting utility rates. *United States Steel Co. v. Pennsylvania PUC*, 37 Pa. Commw. 173, 390 A.2d 865 (1978). Some intervenors in rate cases argue that the value of utility service to different customers varies. These are proponents of value of service pricing. Rates are normally related to cost of service, however. Courts have stated that variations in utility rates are not unduly discriminatory unless there is no reasonable cost justification for the variation. *Citizens Utility Company v. Illinois Commerce Commission*, 50 Ill. 2d 35, 276 N.E.2d 330, 336 (1971); *Gifford v. Central Maine Power Company*, 217 A.2d 200, 202 (Me. 1966).

To determine the costs of serving a specific customer class, the regulatory commission must allocate the overall costs of service of the utility among the various rate classes. The Federal Energy Regulatory Commission has prescribed methods of class cost allocation that utilities must use in filing rate cases, unless the utility is prepared to justify some other method. State regulatory authorities do not always require utilities to provide a cost of service study allocating costs among rate classes in filing a rate case. The potential for abuse in the design of these rates is obvious.

Provision of a class cost allocation study upon which class revenue responsibility is allocated is not enough. The class cost allocation study must incorporate accounting principles that correctly reflect the engineering reality of utility operations. Normally, the costs of service are reduced by receiving electricity at the transmission voltage of the utility. Such a customer should be relieved of any allocation of costs of service responsibility related to distribution plant. Both customers and utilities may have some unique characteristics. The National Association of Regulatory Utility Commissioners has published two useful texts on class cost allocation: *Gas Rate Design* (1981), and the *Electric Utility Cost Allocation Manual* (1973). Analysis and the production of a separate class cost allocation study in a rate case usually require the services of expert witnesses.

If a proper allocation method is used, revenue responsibility should then be allocated among rate classes to move the relative class rates of return earned by a utility toward its overall authorized rate of return. Regulators should adopt an approach to class cost-of-service that will keep moving rate design toward the goal stated in *Re Central Vermont Public Service Corporation*, 28 Pub. Util. Rep. 4th (PUR) 469, 486 (Vt. P.S.B. 1978): "We find it reasonable that the return made by the company in serving each class of customers be as near as practicable to that of serving other customers, and consequently to the average of all customers." Rates imposed upon larger users of utility service which produce class returns far in excess of the overall authorized return of a utility have been found discriminatory. *In Re Green Mountain Power Co.*, 138 Vt. 213, 414 A.2d 1159, 1161 (1980).

Within a rate class, rate design can be an important issue, also. Normally, a rate class consists of customers with similar usage levels and usage patterns. For instance, many utilities have divided their customers into classes such as residential, commercial, industrial, and street lighting. While usage between two residential customers might vary somewhat, that variation is usually less than usage variance between a residential and an industrial customer. A military installation, however, may have an overall annual usage of service as large as a local industry, but the pattern of that usage may be different during the year. To address this problem of rate design within a rate class, one must focus on the "blocking" of the usage in rate design and the terms and conditions applicable to a specific tariff rate. For instance, interruptible customers pose less of an economic burden on a utility system than firm service customers.

Reducing the magnitude of a proposed overall revenue requirement is meaningless if the remaining burden of the increase falls unfairly upon the military installation. The presentations made on behalf of the federal government by the Regulatory Law Office encompass both concerns.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Administrative and Civil Law Note

Digests of Opinions of The Judge Advocate General

DAJA-AL 1986/2619, 12 September 1986. Improperly Constituted Separation Boards.

An administrative separation board that consisted of two commissioned officers and two noncommissioned officers did not comply with AR 635-200, paragraph 2-7*a*, because that paragraph requires such a board to consist of a majority of commissioned or warrant officers. As this board was clearly improperly constituted, the focus became the effect of that error on a soldier's subsequent separation by the separation authority. Not all violations of AR 635-200 cause a separation to be voided. To determine whether a separation is void because of a failure to comply with a regulatory requirement, it must first be determined whether the delegation of authority to direct separation by the Secretary of the Army to the specified commanders was contingent upon compliance with the particular regulatory requirement in question. This determination of regulatory intent must be made by the proponent of the regulation. The proponent of AR 635-200, DAPE-MPS, has opined that a commander is *without authority* to direct separation based upon the recommendations of a board of officers that did not meet the requirement that a majority of the board be commissioned or warrant officers. Therefore, a separation of a soldier based on such an improperly constituted board was void.

DAJA-AL 1986/2036, 11 June 1986. Administrative Separation of Soldiers Pending Punitive Discharge.

AR 635–200, paragraph 1–24*b*, provides that a soldier awaiting trial or result of trial by court-martial will not be discharged until final disposition of those charges. The paragraph further provides that a soldier sentenced to a punitive discharge will not be discharged until appellate review is completed, unless so directed by HQDA.

The Judge Advocate General responded to a request concerning the validity of a general discharge that was given to a soldier under AR 635–200, chapter 13. At the time of the administrative separation, the soldier was awaiting final action from a court-martial that had adjudged a bad-conduct discharge. The Judge Advocate General opined that, because HQDA did not direct the discharge, there was no authority to approve the administrative separation. Therefore, the general discharge under chapter 13 was void and without legal effect.

NOTE: AR 635–200 has recently been changed to clarify that the restrictions, discussed above, do not apply to soldiers processed for discharge under chapter 10, AR 635–200, paragraph 1–24*b* (C7, 15 Oct. 1986).

DAJA-AL 1986/1973, 2 June 1986. Administrative Reductions for Inefficiency.

AR 600–200, paragraph 6–4*b*, provides that "an assigned soldier *who has served in the same unit, for at least 90 days,* may be reduced one grade for inefficiency" (emphasis added). The Judge Advocate General responded to a request from the field for an interpretation of the highlighted language.

The focus of the inquiry was whether "unit," as used in paragraph 6–4*b*, was limited only to a company, battery, or troop-sized unit, or also included larger units (battalions and brigades). After consulting the proponent, The Judge Advocate General opined that this provision requires a 90 day assignment within the organization commanded by the reduction authority. This interpretation supports the policies behind the 90 day requirement: to ensure an adequate opportunity to observe and evaluate the performance of the soldier considered for reduction and to prevent abuse of the reduction authority.

Therefore, for example, a staff sergeant who served 60 days in each of two companies in the same battalion could be considered for reduction by a board convened by the battalion commander, the reduction authority for E–6s (AR 600–200, paragraph 6–1*b*). A higher commander (brigade or division level) could also be the reduction authority in this example (AR 600–200, paragraphs 6–1*b* and 6–4*b*).

Criminal Law Note

Instructing Members in Mixed Plea Cases

At trial, the accused pleads guilty to one specification of distribution of cocaine but not guilty to another specification of distribution of hashish. What should the members be told concerning the pleas of the accused? What does counsel want in this situation? The United States Court of Military Appeals has clarified this area in *United States v. Rivera*[1] and *United States v. Smith.*[2]

The Army Court of Military Review had previously ventured into this area in *United States v. Nixon*[3] and *United States v. Boland.*[4] In *Nixon*, the military judge instructed the members of the prior guilty plea and they were given a flyer including specifications to which the accused had entered both pleas of guilty and not guilty. The court in *Nixon* criticized this practice, referring to it as an "anachronism," but did not find error.[5] Subsequent to *Nixon*, the 1984 Manual for Courts-Martial provided some guidance. The discussion to Rule for Courts-Martial 910(g) states that the military judge should consider and solicit the views of the parties, and that "It is ordinarily appropriate to defer informing the members of the guilty plea until findings on the remaining specifications are entered."[6]

The most recent Army case in this area is a 1986 opinion, *United States v. Boland.*[7] While *Boland* recognized that pleas of guilty may be withheld from the members in rare instances when the defense counsel requests, the court advised trial judges that as a "general rule" they should inform the court members of all pleas in all cases.

Of course, defense counsel's concern with this practice is fear of the "spill-over effect" of such an advisement. Once the members hear that the accused has admitted guilt as to one drug distribution offense, the other distribution finding may become a foregone conclusion.

With this background, the Court of Military Appeals decided the case of *United States v. Rivera.*[8] Sergeant Rivera had entered mixed pleas concerning sex-related offenses involving his adopted daughter. The defense counsel specifically requested that the members not be informed of the guilty pleas until the sentencing phase of the trial because the charges were similar and involved the same victim. Trial counsel urged that the members be informed

[1] 23 M.J. 89 (C.M.A. 1986).

[2] 23 M.J. 118 (C.M.A. 1986).

[3] 15 M.J. 1028 (A.C.M.R.), petition denied, 17 M.J. 183 (C.M.A. 1983).

[4] 22 M.J. 886 (A.C.M.R. 1986).

[5] 15 M.J. 1028 (A.C.M.R. 1983). Due to the dissimilarity of offenses, the court found the members were not improperly influenced. The court added, however:

> While we find no error in this case, we believe that the practice of informing court members of the existence of a charged offense, and of a guilty plea and a finding of guilty thereon prior to presentation of evidence on another charge to which an accused has pleaded not guilty is an anachronism.

Id. at 1030.

[6] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 910(g) discussion [hereinafter R.C.M.].

[7] 22 M.J. 886 (A.C.M.R. 1986). *Boland* noted that the *Nixon* case's discussion on not informing the members of prior guilty pleas until sentencing was "unfortunate language." The Army court expressed concern that the *Nixon* procedures would "encourage gamesmanship" and result in a negative reaction from the members on sentencing. *See also*, Morgan, *To Tell the Truth, the Whole Truth. . . ?*, The Army Lawyer, Oct. 1986, at 65.

[8] 23 M.J. 89 (C.M.A. 1986).

of all arraigned charges. The military judge advised the members of all pleas in the case. He also gave a limiting instruction that advised the members that the guilty plea could not be considered in any way as evidence and that no inference could be drawn from the plea of guilty to a similar offense on the same day.[9]

Chief Judge Everett, writing for the court, noted that: "The dangers in allowing the factfinder to receive information about pleas of guilty to unrelated charges is especially great in courts-martial, because military law is very liberal in allowing the joinder of charges."[10] The court specifically rejected the advice of the Army court in *Boland*, and noted that if military judges follow the advice in R.C.M. 910(g) discussion, "the interests of justice will best be served."[11] Even though the court ruled the judge erred in *Rivera*, the error was held non-prejudicial because the misconduct to which the accused had pled guilty had been admitted on the merits under Mil. R. Evid. 404(b) and a limiting instruction had been given to the members.

Less than a month after *Rivera* was decided, the Court of Military Appeals decided *United States v. Smith*.[12] In *Smith*, the accused pled guilty to a three-day absence without leave and to use of marijuana, but entered pleas of not guilty to disobedience offenses and to a use of cocaine specification. Defense counsel moved to amend the charge sheet, which was to be given to the members, so the members would not be informed of the guilty pleas. The military judge advised the members of all pleas and admonished the members that they could not consider the guilty pleas in deciding the contested offenses.

In this per curiam opinion, the court referred to *Rivera* and noted "that in the usual case, no lawful purpose is served by informing members prior to findings about any charges to which an accused has pled guilty. This is such a case."[13] The court in *Smith* further stated that even though the members were instructed not to consider guilty pleas as evidence, "we recognize the practical difficulty of putting out of one's mind something which has just been placed there; and where it was placed there for no useful purpose, the whole exercise seems futile."[14] The court found a substantial risk of prejudice to the accused concerning the contested cocaine offense arising from the guilty plea to the "generically similar" marijuana use specification. As a result, the court reversed the cocaine use specification.

These decisions reflect the Court of Military Appeals' continuing concern for fairness in the military justice process. The court, however, has not foreclosed informing the members of prior pleas. If counsel can articulate a proper purpose, the procedure of advising of mixed pleas, coupled with a limiting instruction, may not prejudice the accused. The court recognized that in some contested cases the defense counsel may want the members to be informed of the uncontested guilty pleas. In a proper case, the defense counsel could use the tactic of arguing that the accused has demonstrated good faith and pled guilty to the offenses which he has committed. For example, the accused might plead guilty to adultery but not guilty to the charge of rape. Informing the members of the guilty plea in such a case would be consistent with a defense theory of consensual sexual intercourse and may help establish credibility of the accused with the members.[15]

The military judge still has discretion in determining whether to advise the members of prior guilty pleas, but the prudent judge should not do so in light of *Rivera* and *Smith* unless counsel can articulate reasons that the judge can rely on in his or her decision to so advise the members. The military judge should not rely on a passive waiver by the defense counsel to justify advising the members of guilty pleas in split pleas situations. Defense counsel should be prepared to object to such advisement even with a limiting instruction from the military judge unless counsel consciously decides that as a tactical matter his or her client will be better served otherwise. In light of *Rivera* and *Smith*, the defense counsel's tactical desires will be controlling.[16] The "standard practice" of advising members of mixed pleas has become not only an "anachronism" but a potential source of prejudicial error. Major Warren.

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[9] *Id.* at 91.

[10] *Id.* at 95.

[11] *Id.* at 96.

[12] 23 M.J. 118 (C.M.A. 1986).

[13] *Id.* at 120.

[14] *Id.* at 121.

[15] Counsel should also consider the possibility of hostility by a court upon discovering the pleas of guilty at sentencing. For example, in *Boland*, the accused pled guilty to two distributions of marijuana but not guilty to another distribution. The members were not informed of the guilty pleas and acquitted the accused of the contested distribution offense. At sentencing, the court members were advised of the prior guilty pleas to the two other distribution specifications. The appellant characterized his 20 year sentence as "the largest sentence to confinement on drug charges by a jury on Fort Campbell in recent memory." *Boland*, 22 M.J. at 888.
Note that in United States v. Hickson, 22 M.J. 166 (C.M.A. 1986), the court held that an accused may not be convicted of rape and adultery arising out of a single act.

[16] *Boland* also notes the truism, that once a specific defense request in this area is approved, the "appellant should not be heard to complain that because of such a decision he received an unfair trial." *Boland*, 22 M.J. at 891.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, Army, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

Consumer Law Notes

Toy Safety

The holiday season is over and the children have already "burned out" on half of their new toys. It is important to remember, however, that accidents associated with toys, bicycles, and other children's products occur frequently. In 1985, 588,000 children under the age of fifteen were treated in emergency rooms as a result of toy-related injuries (390,000 involving bicycles, 46,000 involving roller skates, 25,000 involving skateboards, 24,000 involving sleds, and 103,000 involving other toys) and there were twenty-two reported fatalities.

While many of the injuries are directly related to the toy itself (for example, lacerations caused by bows and arrows, slingshots, and disk-shaped flying toys), many of the injuries and deaths are more closely related to the child's ability to deal with the nature of the toy. For example, riding toys such as tricycles, bicycles, low-slung three-wheeled toys, rocking horses, and wagons were associated with more injuries treated in hospital emergency rooms than any other type of toy. Many of these injuries were caused when the toy was ridden into the path of a vehicle, into a pool, or into some other obstruction. In addition, many injuries were caused by the ingestion of small toys such as crayons, chalk, and marbles, indicating that misuse rather than the nature of the toy itself is often responsible for the injury.

The U.S. Consumer Product Safety Commission (CPSC) has set mandatory safety standards for electric toys, bicycles, pacifiers, infant rattles, toys with sharp points and edges, lead in paint used in toys, and toys with small parts. It is the manufacturer's responsibility to assure that its products meet the requirements. The CPSC also investigates possible defects in children's products that could present substantial risks of injury to children. Manufacturers and importers have been directed to take corrective actions with respect to toys that violate safety standards or otherwise present substantial risks of injury to children.

Many injuries could be prevented by selecting the proper toy for a given child. Toys should be selected to suit a child's age, skills, abilities, and interests. The CPSC has developed a guide that consumers may use in selecting the appropriate toy for the age of the child. The guide, "Which Toy For Which Child: A Consumer's Guide For Selecting Suitable Toys," is available from the U.S. Consumer Protection Safety Commission, 1111 18th Street N.W., Washington, D.C. 20207, telephone (202) 634–7780, in *two* booklets, one for ages birth through 5 and the other for ages 6 through 12. Captain Hayn.

Defenses to Student Loan Collections

The government has become increasingly aggressive in seeking collection of federally and state-insured student loans, intercepting tax refunds and collecting directly from the paychecks of soldiers and U.S. Government civilian employees. While these debts are often valid, a substantial number of defaulting students are victims of unscrupulous private vocational schools, schools' false promises, and unfair refund policies. A debtor who seeks to defend against an involuntary collection of the debt should consider several sources of precedent concerning unfair and deceptive practices:

1. Section 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. § 45(a)(1) prohibits "unfair or deceptive acts or practices in commerce." Consistent with this prohibition, the FTC has brought several lawsuits against vocational schools involving the schools' claims regarding future job earnings, placement, and school refunds.

2. The FTC Guides for Private Vocational and Home Study Schools, 16 C.F.R. Part 254, identify school practices that are unfair or deceptive. These Guides, which are used by the FTC to determine whether the school's representations conform to laws administered by the FTC, prohibit misrepresentations relating to a schools' affiliation, accreditation, charitable status, facilities, size, courses, admissions criteria, the qualifications of its teachers, and the nature of testimonials by students and employers. Schools must establish reasonable admission criteria so that those admitted are likely to benefit from the instruction offered and to be employable in the field of study, and, before obtaining the student's (or the student's parent's) signature on an enrollment contract, the school should furnish, in writing, "[a]ny other material facts concerning the school and the program of instruction or course which are reasonably likely to affect the decision of the student to enroll therein" (16 C.F.R. § 254.10(e) (1986)).

In addition, the "statement of basis and purpose" of the FTC's Trade Regulation Rule Concerning Proprietary Vocational Schools, 43 Fed. Reg. 60,796 (Dec. 18, 1978), is useful precedent even though the rule has not been in effect since the Second Circuit remanded the rule to the FTC in *Katherine Gibbs School v. FTC,* 612 F.2d 658 (2d Cir. 1979). The "statement of basis and purpose" remains an official FTC finding that general claims about certain jobs being available are deceptive unless important qualifications (*e.g.*, additional training or experience) are disclosed.

3. Many states have promulgated statutes that set out detailed standards for vocational school sales practices. Both these statutes and the cases interpreting them (*see, e.g., Manley v. Wichita Business College,* 237 Kan. 427, 701 P.2d 893 (1985)), can serve as helpful precedent. In addition, basic contract causes of action may be applicable where schools have failed to provide promised services or have failed to make reasonable refunds upon a student's cancellation.

4. 34 C.F.R. § 682.518 (1986) indicates that the United States will refrain in whole or in relevant part from collecting a federally insured student loan in the following situations: if the borrower has a valid defense on the loan; if the school owes the student a refund; if the school closes; if the school or lending institution is the subject of a lawsuit or federal administrative proceeding; or if the debtor dies,

becomes permanently disabled, or discharges the debt in bankruptcy. *United States v. Griffin*, 707 F.2d 1477 (D.C. Cir. 1983), interprets this regulation as allowing debtors to raise against the United States all claims and defenses the student has against the school. Captain Hayn.

State Consumer Protection Statute Construed Broadly

Noting that the Washington Supreme Court had recently rendered a similar finding with respect to the legal profession (*Short v. Demopolis*, 103 Wash. 2d 52, 691 P.2d 163 (1984)), the Court of Appeals of Washington held in *Quimby v. Fine*, 45 Wash. App. 175, 724 P.2d 403 (1986), that the "entrepreneurial" aspects of the medical profession are within the sphere of "trade or commerce" regulated by that state's consumer protection statute. Although previously the "learned professions," such as medicine and law, were considered outside the scope of such statutes, the Washington courts found that such aspects of those professions as how the price of the service is determined, billed, and collected, and how clients are obtained, retained, and dismissed are subject to regulation.

In *Quimby*, the defendant doctor had performed a tubal ligation, substituting one procedure for another without first informing the plaintiff of the substitution, its risks, or its alternatives, and without first obtaining the plaintiff's consent to the substitution. When the plaintiff subsequently became pregnant and bore a child with severe birth defects, the plaintiff sued the doctor alleging, *inter alia*, that the doctor was guilty of medical negligence and lack of informed consent, both actionable under the state's Consumer Protection Act. Although the court found the medical negligence claim inappropriate because it related to the actual competence of the medical practitioner, it found the lack of informed consent claim actionable because

> a lack of informed consent claim can be based on dishonest and unfair practices used to promote the entrepreneurial aspects of a doctor's practice, such as when the doctor promotes an operation or service to increase profits and the volume of patients, then fails to adequately advise the patient of risks or alternative procedures.

This broad interpretation of the scope of a consumer protection statute should encourage practitioners to argue the application of such statutes imaginatively and aggressively. Captain Hayn

Choice of Law in Repossession Actions

Because our population is increasingly mobile, it is ever more common that a car that was purchased in one state is repossessed in another state. The question of which state's laws apply to such repossession actions can make a critical difference to the consumer because the laws vary with respect to the degree to which consumers are protected from such actions, including requirements to give consumers notice, the opportunity to cure the default prior to repossession, and the limits on self-help repossession. Consequently, the consumer should often argue that the law of the state with the most protective law governs. Fortunately for the consumer, there is authority for arguing that the law of the place where the contract was formed applies, that the applicable law is the law of the state of repossession, and other choice of law theories.

The Uniform Commercial Code (U.C.C.), § 1–105, provides that the parties may generally specify the governing law by agreement. If a contract is silent regarding the choice of law or if the contract merely carries a label such as "North Carolina Sales Contract," it will typically be held that there was no agreement as to the choice of law. Contracts that include express choice of laws provisions typically provide that the contract is governed by the laws of the state in which it is made.

Under U.C.C. § 1–105 and general conflicts principles, agreements between the parties are generally controlling. Because the creditor drafts the contract, the creditor rarely attempts to dissuade the court from implementing the agreement (although a creditor has done so on at least one occasion, *see First Wisconsin National Bank of Madison v. Nicolau*, 270 N.W.2d 582 (Wisc. Ct. App. 1978)). Thus, if the contractual provision invokes the more protective state's statute, the consumer is not likely to be faced with a difficult argument.

Even if the agreement would incorporate the less protective state's laws, however, the consumer is not necessarily without an argument to the contrary. Because the U.C.C. policy assumes a genuine agreement between equal bargainers, a consumer who bargains away the more favorable protections of the law in the state of repossession in an adhesion contract may not be bound by this agreement. In addition, consumers seeking application of the more protective law in the repossession state should note that the parties' ability to bargain away application of this law is limited if the repossession state has a strong consumer protection statute, as such statutes represent public policy that the courts will enforce even if this is contrary to the parties' agreement.

Most cases have applied the law of the state in which the debtor resides at the time of repossession, often reasoning that, while the substantive law of the state of contracting would govern such issues as the validity or interpretation of the contract, issues regarding enforcement of the contract are remedial and therefore subject to the local law, where remedies are invoked. Additionally, some courts rely on basic conflicts principles and apply the law of the repossession state because they find this to be the state that has the most "significant contracts" with the parties and the transaction.

Obviously, the court may reach a variety of results in determining the proper forum when the case concerns a multistate repossession action, including not only the state in which the contract was formed and the state of repossession, but also, on occasion, the state in which the contract is performed, which has been construed as the state in which payments on the contract are made. In responding to a repossession action, the consumer should investigate which law is most favorable and argue the application of this law. Captain Hayn.

Tax News

Divorce Taxation

The Tax Reform Act of 1986 made few changes to the rules concerning alimony and child support. The law did, however, remove the requirement that the divorce or separation instrument include specific language that there be no further liability for payments upon the death of the payee spouse. Pub. L. No. 99–514, § 1843(b), *amending* I.R.C.

§ 71(b)(1)(D). This change was made retroactive, curling any problems caused by inadvertent omission of that language. The requirement continues that there be no continuing liability for alimony payments upon the death of the payee spouse; however, that statement need not appear in the instrument. Legal assistance officers may want to continue including that language to avoid confusion.

The Act changes the rules that preclude front-loading alimony payments by reducing, from six to three, the number of years that are to be examined for possible violation of the rules. This change was made effective for all instruments governed by the law as established by the Tax Reform Act of 1984 (generally all agreements and decrees executed after 1984). Additionally, the method of calculating the amount to be recaptured under the rules is changed. In simple terms, under the new rules, alimony payments in the later years (second and third years) will have to be less than the alimony payments in the first year by an amount in excess of $15,000 (previously $10,000) before any of the amounts paid will have to be recaptured. The recapture rule calls for an examination of the payments only in the third repayment year, recapturing any amounts due in that year.

The most significant impact of the Act as it pertains to divorcing couples is the reduction in income tax rates and the increase in the amount of the exemption for each dependent. Because the tax rates are generally reduced, and because there will only be two rates in the future, 15 and 28% (actually three, 33% for the highest income taxpayers), there will be less incentive for shifting income from the spouse with the higher income to the spouse with the lower income. There will still be some benefit from income shifting when one of the spouses has little or no income and other is above the 28% threshold (taxable income above $29,750 for joint filers, $23,900 for heads of household, and $17,850 for single individuals). Primarily, however, the attorney should be concerned with the economic realities of transfers of property and with the economic effect of the divorce.

Transfers of property between spouses, and between former spouses if incident to divorce, will, as under the old law, be treated as gifts. Though this is true, the recipient of the transfer should consider the potential tax liability from a future sale of the property transferred. The potential tax burden will be greater under the new law due to the elimination of the capital gains exclusion. Accordingly, when determining a value for the property at the time of a property division, the attorney representing the transferee should calculate the potential tax liability of a future sale and deduct that amount from the fair market value of the property.

A major change brought about by the Act is an increase in the amount of the exemption for each dependent. The dependency exemption, currently $1,080, will increase to $2,000 by 1989. This increase makes allocation of the dependency exemption for children more significant. For example, it would be ridiculous for a nonworking mother whose only income will be taxable alimony of $4,800 a year to use the dependency exemption for four children. The $8,000 in exemptions would be largely wasted. The mother would have her own $2,000 exemption, reducing her taxable income from $4,800 to $2,800. As a head of household, she would receive a standard deduction of $4,400 in 1988, leaving her with no taxable income. The $8,000 in dependency exemptions could have been better used to offset income of the other spouse. While shifting of the dependency exemptions may be wise, because the value of the exemption will be almost double its current value, a custodial spouse, who under the tax law will be entitled to the exemption unless waived, should ensure that he or she receives fair consideration for waiving the right to the exemption. Major Mulliken.

New W–4 Forms

The following is a reprint of a message from the Office of The Judge Advocate General, DAJA–LA, date time group P 221630Z Dec 86, Subject: Tax Update No. 2, which all offices may not have received:

1. The U.S. Army Finance and Accounting Center plans to distribute the new IRS W–4 forms in January 1987. The installation finance offices should begin distributing them by the end of January. Legal Assistance Officers (LAOs) should ensure that they obtain a stock of these forms. While the deadline for filing a new W–4 is 30 Sep 87, the new tax law may significantly alter an individual's tax withholding status. Waiting until 30 Sep to file could result in either too large a withholding for the year or a significant tax bill at the end of the year. A large tax due may result in increased penalties for underwithholding. Thus, early preparation and submission of this form is recommended.

2. The new W–4 form consists of four pages and may be intimidating for many individuals. LAOs should become familiar with the new forms. In coordination with the local finance office, LAOs should develop a system to distribute the new forms and provide information and assistance in their preparation.

3. LAOs should ensure that information is disseminated locally concerning the new tax act and its ramification upon our soldiers.

Interest Rates on Tax Deficiencies

Beginning in 1987, the interest charged on tax deficiencies will be adjusted four times each year rather than twice a year, as it is currently. The rate charged on underpayments will be set at the short-term federal rate plus three percent. If, however, the Internal Revenue Service (IRS) owes the taxpayer money, the rate of interest paid on these overpayments will only be the short-term federal rate plus two percent. Beginning 1 January 1987, the interest charged on underpayments will be nine percent. The IRS will pay eight percent interest on overpayments.

Landlord's Liability for Injuries Due to Criminal Assault

Many jurisdictions would not, as a matter of doctrine, find a landlord responsible for injuries to a tenant that result from the criminal acts of third persons who are not employees or agents of the landlord. Nevertheless, A recent case from Illinois shows that there may be an available theory of landlord liability.

In *Duncavage v. Allen,* 147 111. App. 3d 88, 497 N.E.2d 433 (1986), a medical student rented an apartment from the defendant. The landlord did not disclose that a burglary had occurred in the same apartment a few weeks before. A few weeks after the student rented the apartment, an intruder used a ladder and entered the apartment through a

window that the plaintiff alleged had no screen and could not be locked. The assailant raped and murdered the student. The ladder used was allegedly the same ladder that was used in the prior break-in and had been left in the yard unattended.

The plaintiff sued the landlord, alleging that the defendent had violated Illinois' Consumer Fraud Act by omitting material facts surrounding the apartment, specifically that a burglary had occurred in the same apartment a few weeks prior when a burglar had gained access through the same window. The plaintiff claimed that the decedent was a consumer and that the apartment and its maintenance were products or services distributed in commerce. The court found a cause of action to exist against the landlord under the Consumer Fraud Act, which makes it unlawful to engage in deceptive acts of misrepresentation or concealment in the conduct of any trade or commerce.

The court also determined that while a landlord is generally not responsible for the criminal acts of third parties, there is a common exception to that doctrine: when the criminal act is reasonably foreseeable, the landlord has a duty of reasonable care to guard against such acts. In this case, the criminal activity was clearly foreseeable, as there had been a prior break-in just a few weeks prior. Additionally, the court found that the landlord had a duty to keep common areas in a reasonably safe condition. In this case, the landlord had failed to keep the weeds in back of the apartment cut, making it easy for someone to hide in the weeds. Additionally, there was no lighting in the common area behind the apartments. The court also looked to the local housing code to find a duty of care imposed on the landlord. Major Mulliken.

Claims Report

United States Army Claims Service

Sir, The General Wants To File a Claim

The claims office's role is to assist soldiers in having their claims settled promptly and fairly, consistent with protecting the interests of the United States. The commanding general's claim should be viewed as an opportunity for the staff judge advocate to demonstrate how well the claims office provides service to the soldier.

Dep't of Army, Reg. No. 27–20, Legal Services-Claims, para. 2–22*d* (18 Sept. 1970) requires staff judge advocates to forward the claims of persons in their rating chains to the next higher settlement authority to avoid any appearance of impropriety. That the claim of an officer in the rating chain is properly handled should be a concern of the staff judge advocate. It is often apparent to this Service, however, that the staff judge advocate has not been briefed about these claims before they are forwarded for adjudication. To ensure that such claims are evaluated as completely as the claims of all soldiers at the installation, the staff judge advocate should review the files for proper documentation and take active steps to prevent future adjudication obstacles.

Absence of adequate and complete documentation is the major problem with senior officer claims files forwarded to the U.S. Army Claims Service. Necessary transportation documents and estimates substantiating the loss are often missing. Frequently, the salvage issue is not addressed, or the officer has not been provided an opportunity to explain circumstances relating to deduction of lost potential carrier recovery. Too often, follow-up communication regarding the claim is provided through an aide or a secretary without coordination with the claims judge advocate. To avoid these problems, the staff judge advocate should ensure that the file is carefully screened before it is forwarded. Everything necessary to settle the claim must be present and everything known to personnel in the claims office must be reflected on the chronology sheet.

The assistance that claims personnel may give such claimants in obtaining complete documentation is limited only by the ingenuity and the resources the staff judge advocate makes available to the claims office. One option to consider is the use of an adjudicator to inspect damaged items. A line by line review of items on the DD Form 1844 to minimize delay and inconvenience is another recommended course of action. Additionally, the aggressive use of agreed cost of repairs (AGC) is particularly valuable because up to $100 may be approved for payment for an item inspected by claims personnel, without an estimate of repair.

A better understanding of claims procedures, as well as preventive claims measures, may be accomplished by having the claims judge advocate brief commanders about personnel claims. Not only does this give the staff judge advocate an opportunity to provide a needed service to senior officers, but it will also serve to gauge the adequacy of transportation briefings at the installation. Outgoing senior officers have a particular need to be briefed on maximum allowances and supplemental protection. Incoming senior officers have a need to understand lost potential carrier recovery. The time spent explaining this system and the use of the table of maximum allowances, the concept of increased valuation, full replacement cost protection, and the DD Form 1840R, will best serve all soldiers, including the commanding general, and enhance the effective operation of the installation claims office.

In summary, an astute staff judge advocate will ensure that the following is accomplished concerning claims of persons in his or her rating chain:

ensure that you are advised when such a claim is presented;

ensure that the claim is completely reviewed and documented before it is forwarded; and

ensure that senior officers are properly briefed in personnel claims procedures and preventive claims measures.

Carrier Recovery Note

Paragraph 11–40*a*(2)(a)*2*, AR 27–20 requires the office paying a carrier loss or damage claim to forward to the U.S. Army Claims Service an unsealed envelope addressed to the carrier as a part of the completed claim file. The unsealed addressed envelope *must* be a Department of the Army (*i.e.*, "franked") envelope authorized for posting as official mail. Many offices are using plain envelopes that cannot be used for official mailing and thus are of no use. Failure to use envelopes authorized for official mailing results in wasteful duplication because a proper envelope must be addressed again by this Service in order to mail the demand and the original envelope discarded.

Personnel Claims Note

This note concerns courtesy. Courtesy displayed by those who provide claims services to the military community must be maintained at a high level. Evaluation of a staff judge advocate's concern for customers is strongly influenced by the social attitudes exhibited at service-type facilities. Where there is daily contact between people providing services and an even larger number of people being served, courtesy must pervade every facet of the activity. It is just as important to give a courteous explanation for a delay to an Army wife waiting in line as it is to the soldier waiting to process a claim. An attitude that "the customer is always right" will set the tone that those serving are truly trying to meet the desires of those being served. The little extra effort to assure courtesy will be repaid to us many times over in improved morale. At all times, the courtesy and interest displayed by claims personnel should be at least equal to the courtesy and interest one desires and expects when receiving similar service. Speak to people when they enter the office for service. There is nothing as nice as a cheerful word of greeting and being helpful. It doesn't do any harm to smile and say "Good Morning," even if it is raining. Be considerate and thoughtful of the opinions of our claimants and be alert to give service. We know that having lost or damaged property is a bad experience and we should not take the other person's grouch too seriously. Remember that "getting along" depends almost entirely on those providing the service. The principles of courtesy and customer respect cannot be overemphasized and should be observed as the point of reference for all customer transactions or services regardless of the circumstances.

Tort Claims Note

Timely notice of potential claims incidents is vital to successful tort claims management. At installations where a diverse group of units is supported, however, this is a challenge requiring special liaison efforts and continuous coordination. Fort Sheridan is such an installation and its staff judge advocate, Lieutenant Colonel J.E. Bailey, III, has developed the following successful notification channels and responsibilities to promote the timely receipt of notice of all potential claims.

For National Guard cases, the full-time safety officers and Army Guard and Reserve (AGR) judge advocates have been consulted and now provide prompt written reports or direct telephonic notice where warranted by the facts.

For Recruiting Command incidents, similar coordination with the recruiting brigade's motor officer has resulted in a procedure where both written and telephonic notice are provided directly to the claims office.

For soldiers using General Services Administration (GSA) vehicles, coordination with the GSA regional counsel has promoted effective sharing of information and notice of additional potential claims.

For incidents involving transportation motor pool (TMP) vehicles, the motor pool officer has been fully briefed of the claims program and now provides timely notice of incidents.

For Army Reserve personnel, coordination with individual units has resulted in the safety officers of those units providing direct notice. Many documents in the safety file may be pertinent to investigation of potential claims, such as claims inquiry letters and original repair estimates. Additionally, these liaisons can provide information on incidents that could give rise to an affirmative claim either for property damage or injury to a soldier resulting in medical care.

Guard and Reserve Affairs Notes

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

New NG JAGC Brigadier General

The National Guard Bureau has announced the selection of Colonel William F. Sherman, Arkansas Army National Guard, as the Army National Guard Special Assistant to The Judge Advocate General, Army, effective 1 March 1987.

Colonel Sherman was born in Little Rock, Arkansas. He received his Bachelor of Arts degree from the University of Arkansas and his law degree from the University of Virginia in Charlottesville, Virginia.

Colonel Sherman graduated from the United States Army Basic Infantry Officer Course. He held various infantry assignments, including platoon leader, Special Forces "A" Team Leader, various battalion staff positions, and infantry battalion commander.

After transferring to the Judge Advocate General's Corps, Colonel Sherman was assigned to the Judge Advocate Section of the 39th Infantry Brigade and subsequently to the position of Staff Judge Advocate, Arkansas Army National Guard.

Colonel Sherman is also a graduate of the Infantry Officer Advanced Course, the Judge Advocate Officer Advanced Course, Command and General Staff College, and the Army War College. In addition, he has completed both the Basic Airborne Course and Jumpmaster Course.

Currently Colonel Sherman resides in Little Rock, Arkansas, where he is engaged in the private practice of law. He is married and has four children.

Promotion in the Reserve Components

Each year, the Guard and Reserve Affairs Department receives numerous inquiries regarding officer promotions in the Reserve Components. The most frequently asked questions involve the point at which an officer will be considered for promotion, educational requirements for promotion, and matters that are considered by the promotion board. The following is intended to answer those questions and provide additional general information.

Policy and procedures pertaining to Reserve Component promotions are contained in Army Regulation 135–155. Reserve Component officers should familiarize themselves with this regulation. The Reserve Component promotion system differs significantly from the Active Component system. The primary difference is the standard employed by promotion boards. Active Component Boards use the "best qualified" standard. Reserve Component boards use the "fully qualified" standard for promotion through the grade of lieutenant colonel. The net result of this difference is a higher selection rate for officers considered by Reserve Component boards.

Types of Promotion

There are two routes to promotion in the Reserve Components. The most important is the mandatory selection board. Officers are considered by mandatory boards at specified intervals through their careers (discussed below). Officers twice failing to be selected for promotion by these boards are mandatorily discharged or transferred to the Retired Reserve. The second route to promotion is the unit vacancy selection board. These boards are convened three times a year by the Continental United States Armies to select officers for promotion to vacant higher grade unit positions. Failure to be selected by a unit vacancy board has no adverse impact on an officer's career.

Promotion Eligibility

To be eligible for consideration for promotion to the next higher grade, an officer must be in an active Reserve Component status. All officers assigned to units, IMA positions, and Control Group (Reinforcement) meet this requirement. The officer must also meet the minimum time in service and time in grade requirements shown below.

Years In Grade

Promotion to	Unit Vacancy Board	Mandatory Board	Years in Service*
Captain	2	4	6
Major	4	7	12
Lieutenant Colonel	4	7	17
Colonel	3	**	

*The Years of Service requirement is not applicable to unit vacancy boards.
**Announced annually by HQDA.

There is an important exception to the years in service requirement. A Reserve Component officer's years of service for promotion purposes is considered to be the greater of actual years of service or the difference between the officer's age and twenty-five. The three years of constructive service credit awarded as a result of law school is also considered time in service for promotion purposes. For example, Major A. was promoted in 1982 with 8 years in service at the age of 32. Major A. will be eligible for promotion in 1991, which is the point at which both the time in grade and time in service requirements are met (7 years time in grade, '82–89 and 17 years time in service, '74–91). Major B. was promoted in 1982 with 8 years in service at the age of 35. Major B. will be eligible for promotion in 1989, which is the point at which both the time in grade and time in service requirements are met (7 years time in grade, '82–'89 and 17 years in service, 42 years of age less 25).

Educational Requirements

An absolutely essential requirement for promotion is completion of the appropriate level of military education for the next higher grade. Officers who do not meet these requirements prior to the convening of the promotion board are not eligible for promotion.

Educational Requirements For Promotion

Grade	Requirement
Captain	Basic Course
Major	Advanced Course
Lieutenant Colonel	½ Command and General Staff Course*
Colonel	Command and General Staff Course*

*The JA Reserve Components General Staff Course also satisfies this requirement although it is no longer offered by the Judge Advocate General's School.

There is an important exception to educational requirements that applies to officers with active duty service. These officers are considered to be educationally qualified for promotion for three years after the date of their separation from active duty.

Zones of Consideration

First consideration for promotion by a mandatory board occurs in advance of the date an officer meets both time in grade and time in service requirements. Generally, promotion boards meet each year according to the following schedule: captain, January; major, February; lieutenant colonel, August; and colonel, October. Zones of consideration are generally as follows: captain, 16 May to 15 May; major, 16 May to 15 May; lieutenant colonel, 1 January to 31 December; and colonel, 1 January to 31 December.

Therefore, if the promotion eligibility date (based on time in grade and time in service requirements) and the zone of consideration are known, the officer will know when he or she will be considered for promotion as officers are considered for promotion by the board which meets before the first date in the zone of consideration.

Promotion Standards

The "fully qualified" standard is used by all Reserve Component mandatory promotion boards through the grade of lieutenant colonel. The "fully qualified" standard requires satisfaction of the following elements:

1. In the zone of consideration;

2. Satisfactory participation;

3. Physically, morally, and professionally qualified;

4. Education requirements complete; and

5. Capable of performing the duties in the next higher grade.

As a practical matter, satisfactory performance means that officers must have OERs in their file. As long as an officer meets the training requirements in either a unit or the IMA program, this element will be met. It is therefore important to remain active. If an officer misses a few years along the way, this element may still be met depending upon the timing of those years.

Physical, moral, and professional qualification are addressed on the front page of the OER. An officer's height, weight, and Army physical readiness test results are important as well as the official photograph.

Finally, it is important that an officer's personnel file is complete. Officers are sent a copy of their personnel file before the board meets to ensure the file is accurate and complete. One promotion board was postponed last year because the number of incomplete files was in excess of seventy-five percent. Officers should therefore take the time necessary to ensure that their personnel files are complete to give them the best possible chance for selection at a promotion board.

Results of the 1986 LTC Reserve Components Promotion Board

The results of the 1986 LTC Promotion Board show once again that the greatest obstacle to promotion is the failure of the officer to satisfy the educational requirement. For promotion to LTC, the educational requirement is fifty percent of Command and General Staff College. One hundred and six USAR JAGC officers were considered. Sixty-four officers were selected. That is a 60% selection rate for JAGC compared to a 43% average selection rate for all branches. Of the educationally-qualified officers (68), 64 were selected (94%).

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

March 9-13: 11th Admin Law for Military Installations (5F-F24).

March 16-20: 35th Law of War Workshop (5F-F42).

March 23-27: 20th Legal Assistance Course (5F-F23).

March 31-April 3: JA Reserve Component Workshop.

April 6-10: 2d Advanced Acquisition Course (5F-F17).

April 13-17: 88th Senior Officers Legal Orientation Course (5F-F1).

April 20-24: 17th Staff Judge Advocate Course (5F-F52).

April 20-24: 3d SJA Spouses' Course.

April 27-May 8: 111th Contract Attorneys Course (5F-F10).

May 4-8: 3d Administration and Law for Legal Specialists (512-71D/20/30).

May 11-15: 31st Federal Labor Relations Course (5F-F22).

May 18-22: 24th Fiscal Law Course (5F-F12).

May 26-June 12: 30th Military Judge Course (5F-F33).

June 1-5: 89th Senior Officers Legal Orientation Course (5F-F1).

June 9-12: Chief Legal NCO Workshop (512-71D/71E/40/50).

June 8-12: 5th Contract Claims, Litigation, and Remedies Course, (5F-F13).

June 15-26: JATT Team Training.

June 15-26: JAOAC (Phase IV).

July 6-10: US Army Claims Service Training Seminar.

July 13-17: Professional Recruiting Training Seminar.

July 13-17: 16th Law Office Management Course (7A-713A).

July 20-31: 112th Contract Attorneys Course (5F-F10).

July 20-September 25: 113th Basic Course (5-27-C20).

August 3-May 21, 1988: 36th Graduate Course (5-27-C22).

August 10-14: 36th Law of War Workshop (5F-F42).

August 17–21: 11th Criminal Law New Developments Course (5F–F35).

August 24–28: 90th Senior Officers Legal Orientation Course (5F–F1).

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	30 September annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 December annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1987 issue of The Army Lawyer.

4. Indiana Mandatory CLE Update

Indiana began mandatory CLE on October 1, 1986. The rules require attorneys to take 36 hours of approved CLE instruction within a three-year educational period, with a further requirement that in any year of the educational period attorneys must take at least six hours of credit. A year is defined as beginning on October 1.

In order to fund the Commission for Continuing Legal Education, the rules impose a onetime special assessment of $10.00 on each Indiana attorney. This amount was due to the Clerk of the Indiana Supreme Court by January 2, 1987.

Resident courses at TJAGSA qualify for CLE credit.

5. Army Sponsored Continuing Legal Education Calendar (March–December 1987)

The following is a schedule of Army Sponsored Continuing Legal Education, not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change, check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697–3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972–6380; Trial Judiciary, (703) 756–1795; Trial Counsel Assistance Program (TCAP), (202) 756–1804; U.S. Army Trial Defense Service (TDS), (202) 756–1390; U.S. Army Claims Service, (301) 677–7804; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: CPT Butler, Heidelberg Military 8930). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: MAJ Williams, TJAGSA, (804) 972–6342

Training	Location	Date
TJAGSA On-Site	Columbia, SC	7–8 March 1987
USAREUR Contract Law CLE Course	Nuernberg, Germany	9–13 March 1987
TJAGSA On-Site	San Juan, PR	10–11 March 1987
TJAGSA On-Site	Kansas City, MO	14–15 March 1987
Fiscal Law Course	Wiesbaden, Germany	16–20 March 1987
TCAP Seminars,	V Corps	16–17 March 1987
USAREUR	1st Armd Div	19–20 March 1987
	VII Corps	23–24 March 1987
	21st SUPCOM	26–27 March 1987
TJAGSA On-Site	Sacramento, CA	21–22 March 1987
TDS Regional Workshops (Regions VII & IX)	USAREUR	March 1987
Tri-Service Judicial Conference	Maxwell AFB, AL	March 1987
Eastern Claims Service Regional Workshop	Louisville, KY	6–9 April 1987
TDS Regional Workshop (Region I)	Fort Knox, KY	April 1987
TDS Regional Workshop (Region II)	Fort Benning, GA	April 1987
TJAGSA On-Site	Chicago, IL	11–12 April 1987
TJAGSA On-Site	New Orleans, LA	11–12 April 1987
TCAP Seminars	Korea	13–14 April 1987
	Okinawa	16–17 April 1987
	Philippines	20–21 April 1987
	Hawaii	23–24 April 1987
TDS Regional Workshop (Region III)	Fort Carson, CO	April 1987
TDS Regional Workshop (Region V)	Treasure Island, CA	April 1987
TJAGSA On-Site	Washington, DC	25–26 April 1987
TJAGSA On-Site	Birmingham, AL	2–3 May 1987
Western Claims Service Regional Workshop	Denver, CO	12–14 May 1987
TJAGSA On-Site	Columbus, OH	16–17 May 1987
TJAGSA On-Site	Atlanta, GA	16–17 May 1987
TCAP Seminar	Fort Ord, CA	May 1987
USAREUR Law of War Workshop	TBA	May 1987
TCAP Seminar	Fort Hood, TX	June 1987
TDS Regional Workshop (Region IV)	Fort Hood, TX	June 1987
TCAP Seminar	Atlanta, GA	July 1987
TDS Regional Workshop (Region V)	Fort Lewis, WA	July 1987
TCAP Seminar	Fort Monroe, VA	August 1987
USAREUR Legal Assistance CLE Conference	TBA	8–11 Sept 1987
TCAP Seminar	Kansas City, MO	September 1987

5th Circuit Judicial Conference	Garmisch, Germany	September 1987
TDS Regional Workshop (Region II)	Fort Stewart, GA	September 1987
USAREUR Criminal Law Workshops and Advocacy Course	Garmisch, Germany	12–23 Oct 1987
PACOM CLE	TBA	Sept–Oct 1987
TJAGSA On-Site	Minneapolis, MN	October 1987
TDS Regional Workshop (Region III & VI)	TBA	October 1987
TJAGSA On-Site	Honolulu, HI	October 1987
TJAGSA On-Site	Philadelphia, PA	October 1987
TJAGSA On-Site	Boston, MA	October 1987
TCAP Seminar	Fort Hood, TX	November 1987
TDS Regional Workshop (Region I)	TBA	November 1987
1st/2d Circuit Judicial Conference	TBA	November 1987
TJAGSA On-Site	St. Louis, MO	November 1987
TJAGSA On-Site	Detroit, MI	November 1987
TJAGSA On-Site	Indianapolis, IN	November 1987
TCAP Seminar	Fort Lewis, WA	December 1987
USAREUR International Affairs CLE Conference	TBA	December 1987
3d/4th Circuit Judicial Conference	TBA	December 1987
TJAGSA On-Site	New York, NY	December 1987

6. Continuing Legal Education for Legal Specialists & Court Reporters

The courses listed below are available in 1987 for the training of Reserve Component legal specialists & court reporters. Information regarding attendance, quotas, and course requirements should be directed to the sponsoring agency, or to the staff judge advocate's office of the CONUS Army where the instruction is being held.

1st Army Area

12–15 March; Naval Justice School, RI. 71D Refresher Training. Sponsor: 3rd MLC, 94th ARCOM.

3–15 May; Ft. Meade, MD. 71D MOS Qualification Course. Sponsor: 1st Army.

15–26 June; Naval Justice School, RI. 71E MOS Qualification Course. Sponsor: 1st Army.

22 June–3 July; Naval Justice School, RI. 71E Refresher Training. Sponsor: 1st Army.

October (tentative); Philadelphia, PA. 71E/71D Instructor Qualification Course. Sponsor: 1st Army.

2nd Army Area

31 May–12 June; Hattiesburg, MS. 71D MOS Qualification Course. Sponsor: 2nd Army.

2–14 August; Hattiesburg, MS. 71D MOS Qualification Course. Sponsor: 2nd Army.

4th Army Area

7–8 March; St. Paul, MN. 71D/71E Refresher Training. Sponsor: MN National Guard.

12–24 July; Ft. Sheridan, IL. 71D MOS Qualification Course. Sponsor: 4th Army.

17–18 July; Columbus, OH. 71D/71E Refresher Training. Sponsor: 9th MLC.

26 July–7 August; Ft. Sheridan, IL. 71D MOS Qualification Course. Sponsor: 4th Army.

5th Army Area

7–8 February; San Antonio, TX. 71D/71E Refresher Training. Sponsor: 90th ARCOM.

14–15 March; Kansas City, MO. 71D/71E Refresher Training. Sponsor: 89th ARCOM.

20–24 April; San Antonio, TX. 71D/71E Refresher Training. Sponsor: 5th Army/OTJAG

14–27 June; Ft. Sam Houston, TX. 71D MOS Qualification Course. Sponsor: 5th Army.

14–27 June; Ft. Sam Houston, TX. 71D Refresher Training. Sponsor: 5th Army.

6th Army Area

7–20 June; Presidio of San Francisco, CA. 71D Refresher Training. Sponsor: 6th Army.

21 June–4 July; Camp Parks, CA. 71D MOS Qualification Course. Sponsor: 6th Army.

1–15 August; Presidio of San Francisco, CA. 713A (Legal Administrator) Refresher Course. Sponsor: 6th Army.

7. Civilian Sponsored CLE Courses

May 1987

1–2: FBA, Special Meeting Commemorating Bicentennial of the U.S. Constitution, Philadelphia, PA.

3–7: NCDA, Trial Advocacy, New Orleans, LA.

3–8: NJC, Civil Evidence, Reno, NV.

4: PLI, Regulatory/Current Issues, San Francisco, CA.

4–5: NYUSCE, Legal Issues in Acquiring and Using Computers, Washington, D.C.

4–8: PLI, Insurance Week, San Francisco, CA.

4–8: SLF, Law and Labor Arbitration, Dallas, TX.

6: PLI, Hazardous Waste and Product Liability Insurance, San Francisco, CA.

6: NKU, Medical Malpractice, Covington, KY.

6–8: ALIABA, Litigating Medical Malpractice Claims, San Francisco, CA.

7: PLI, Directors' and Officers' Liability Insurance, San Francisco, CA.

7: ALIABA, Environmental Law, 40 cities USA, D.C.

7–8: SLF, Wills and Probate Institute, Dallas, TX.

7–17: NITA, Southeast Regional Trial Advocacy, Chapel Hill, NC.

8: PLI, Bad Faith Litigation, San Francisco, CA.

8–9: ATLA, Products Liability Seminar, Milwaukee, WI.

10–15: NJC, Alcohol and Drugs and the Courts, Reno, NV.

13–15: USCLC, Computer Law Institute, Los Angeles, CA.

13–22: UKCL, Trial Advocacy (Intensive), Lexington, KY.

14: MNCLE, Libel Law, Minneapolis, MN.

14–15: PLI, Commercial Real Estate Leases, New York, NY.

14–16: ALIABA, Fundamentals of Bankruptcy Law, Philadelphia, PA.

15–16: ATLA, Professional Negligence Seminar, Hartford, CT.

17–22: NITA, Advanced Trial Advocacy, Houston, TX.

21: ABA, Legal Malpractice (Satellite) 40 cities USA, D.C.

21–31: NITA, Mid America Regional Trial Advocacy, Lawrence, KS.

22–23: ULSL, Tax "Mini Institute," Louisville, KY.

29: NKU, Pre-Judgment Remedies, Highland Hts., KY.

31–5: ATLA, Basic Course in Trial Advocacy, Reno, NV.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020, (212) 484–4006.

AAJE: American Academy of Judicial Education, Suite 903, 2025 Eye Street, N.W., Washington, D.C. 20006. (202) 775–0083.

ABA: American Bar Association, National Institutes, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988–6200.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486. (205) 348–6280.

AICLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201. (501)371–2024.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALIABA: American Law Institute—American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800)CLE–NEWS; (215)243–1600.

ARBA: Arkansas Bar Association, 400 West Markham Street, Little Rock, AR 77201. (501)371–2024.

ASLM: American Society of Law and Medicine, 765 Commonwealth Avenue, Boston, MA 02215. (617)262–4990.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. Washington, D.C. 20007. (800)424–2725; (202)965–3500.

BLI: Business Laws, Inc., 8228 Mayfield Road, Chesterfield, OH 44026. (216)729–7996.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, D.C. 20037. (800)424–9890 (conferences); (202)452–4420 (conferences); (800)372–1033; (202)258–9401.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415)642–0223; (213)825–5301.

CCLE: Continuing Legal Education in Colorado, Inc., Huchingson Hall, 1895 Quebec Street, Denver, CO 80220. (303)871–6323.

CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706. (608)262–3833.

DRI: The Defense Research Institute, Inc., 750 North Lake Shore Drive, #5000, Chicago, IL 60611. (312) 944–0575.

FB: The Florida Bar, Tallahassee, FL 32301.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006. (202) 638–0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, D.C. 20003.

FPI: Federal Publications, Inc. 1725 K Street, N.W., Washington, D.C. 20036. (202) 337–7000.

GCP: Government Contracts Program, The George Washington University, Academic Center, T412, 801 Twenty-second Street, N.W., Washington, D.C. 20052. (202) 676–6815.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GULC: Georgetown University Law Center, CLE Division, 25 E Street, N.W., 4th Fl., Washington, D.C. 20001. (202) 624–8229.

HICLE: Hawaii Institute for Continuing Legal Education, c/o University of Hawaii, Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

IICLE: Illinois Institute for Continuing Legal Education, 2395 W. Jefferson Street, Springfield, IL. 62702. (217)787–2080.

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 1926 Arch Street, Philadelphia, PA 19103. (215) 732–6999.

KBA: Kansas Bar Association CLE, P.O. Box 1037, Topeka, KS 66601. (913)234–5696.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506. (606)257–2922.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800)421–5722; (504)566–1600.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803. (504)388–5837.

MBC: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102. (314)635–4128.

MCLE: Massachusetts Continuing Legal Education, Inc., 44 School Street, Boston, MA 02109. (800)632–8077; (617)720–3606.

MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906. (800)446–3410; (804)295–6171.

MICLE: Institute of Continuing Legal Education, University of Michigan, Hutchins Hall, Ann Arbor, MI 48109–1215. (313)764–0533; (800)922–6516.

MNCLE: Minnesota CLE, 40 North Milton, St. Paul, MN 55104. (612)227–8266.

MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04330.

NATCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCBAF: North Carolina Bar Association Foundation, Inc., 1025 Wade Avenue, P.O. Box 12806, Raleigh, NC 27605.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. (713) 749–1571.

NCJJ: National College of Juvenile Justice, University of Nevada, P.O. Box 8978, Reno, NV 89507–8978. (702) 784–4836.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 American Charter Center, 206 South 13th Street, Lincoln, NB 68508.

NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924–3844.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800)225–6482; (612)644–0323 in MN and AK.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784–6747.

NJCLE: New Jersey Institute for Continuing Legal Education, 15 Washington Place, Newark, NJ 07102–3105.

NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland, Hts., KY 41011. (606) 572–5380.

NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, D.C. 20006. (202) 452–0620.

NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301 Albuquerque, NM 87103. (505)243–6003.

NUSL: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 908–8932.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518)463–3200; (800) 582–2452 (books only).

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 10038. (212) 349–5890.

NYULS: New York University, School of Law, Office of CLE, 715 Broadway, New York, NY 10003. (212)598–2756.

NYUSCE: New York University, School of Continuing Education, 11 West 42nd Street, New York, NY 10036. (212) 580–5200.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201–0220. (614) 421–2550.

PBI: Pennsylvania Bar Institute, 104 South Street, Harrisburg, PA 17108–1027. (800) 932–4637 (PA only); (717) 233–5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765–5700 ext. 271.

PTLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

SBA: State Bar of Arizona, 234 North Central Avenue, Suite 858, Phoenix, AZ 85004. (602)252–4804.

SBMT: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711. (512)475–6842.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080–0707. (214)690–2377.

SMU: Southern Methodist University, School of Law, Office of Continuing Legal Education, 130 Storey Hall, Dallas, TX 75275. (214)692–2644.

SPCCL: Salmon P. Chase College of Law, Committee on CLE, Nunn Hall, Northern Kentucky University, Highland Heights, KY 41076 (606) 527–5380.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205.

TLS: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118. (504)865–5900.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street, N.W., Washington, D.C. 20036, (202)337–7000.

UDCL: University of Denver College of Law, Program of Advanced Professional Development, 200 West Fourteenth Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004. (713)749–3170.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506. (606) 257–2922.

UMC: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MO 65211.

UMCC: University of Miami Conference Center, School of Continuing Studies, 400 S.E. Second Avenue, Miami, FL 33131. (305)372–0140.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816)276–1648.

UMSL: University of Miami School of Law, P.O. Box 248105, Coral Gables, FL 33124. (305)284–5500.

USB: Utah State Bar, 425 East First South, Salt Lake City, UT 84111.

UTSL: University of Texas School of Law, 727 East 26th Street Austin, TX 78705 (512) 471–3663.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804)924–3416.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, Continuing Legal Education, 505 Madison Street, Seattle, WA 98104. (206) 622–6021.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1–100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22304–6145, telephone (202) 274–7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

The four volume Criminal Law Trial Procedure text has been replaced by Dep't of Army, Pam. No. 27–173, Legal Services—Trial Procedure (15 Feb. 1987). There are new versions of The Criminal Law Evidence texts and several Administrative and Civil Law texts.

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B090375	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–85–1 (200 pgs).
AD B090376	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–85–2 (175 pgs).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD A174509	All States Consumer Law Guide/ JAGS–ADA–86–11 (451 pgs).
AD B100236	Federal Income Tax Supplement/ JAGS–ADA–86–8 (183 pgs).
AD B100233	Model Tax Assistance Program/ JAGS–ADA–86–7 (65 pgs).
AD B100252	All States Will Guide/JAGS–ADA–86–3 (276 pgs).
AD B080900	All States Marriage & Divorce Guide/ JAGS–ADA-84–3 (208 pgs).
AD B089092	All-States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771	All-States Law Summary, Vol I/ JAGS–ADA–85–7 (355 pgs).
AD B094235	All-States Law Summary, Vol II/ JAGS–ADA–85–8 (329 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857	Proactive Law Materials/JAGS–ADA-85–9 (226 pgs).

Claims

AD B087847	Claims Programmed Text/ JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849	AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).
AD B100235	Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251	Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).
AD B087850	Defensive Federal Litigation/ JAGS–ADA–87–1 (377 pgs).
AD B100756	Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845	Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999	Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204	Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs.)

Criminal Law

AD B107951	Criminal Law: Evidence I/ JAGS–ADC–87–1 (228 pgs).
AD B100239	Criminal Law: Evidence II/ JAGS–ADC–87–2 (144 pgs).
AD B100240	Criminal Law: Evidence III (Fourth Amendment)/JAGS–ADC–87–3 (211 pgs).
AD B100241	Criminal Law: Evidence IV (Fifth and Sixth Amendments)/JAGS–ADC–87–4 (313 pgs).
AD B095869	Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B100212	Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 18–19	Troop Program Sequence Number		5 Dec 86
AR 95–1	General Provisions and Flight Regulations		18 Dec 86
AR 140–30	Military Police	2	21 Nov 86
AR 310–34	The Department of the Army Equipment Authorization and Usage Program		12 Nov 86
AR 600–3	The Army Personnel Proponent System		30 Nov 86
AR 360–5	Public Information		24 Dec 86
AR 600–37	Unfavorable Information		19 Dec 86
AR 601–50	Appointment of Temporary Officers in the Army of the U.S. Upon Mobilization		15 Dec 86
AR 611–201	Enlisted Career Management Field and Military Occupational Specialities		31 Oct 86
AR 700–138	Army Logistics Readiness and Sustainability		17 Dec 86
AR 702–4	Contract Quality Assurance for Maintenance and Overhaul of Major Items and Components	2 App B	7 Nov 86
AR 930–4	Army Emergency Relief		24 Nov 86
CIR 11–86–3	Internal Control Review Checklists		17 Dec 86
DA Pam 310–1	Index of Army Publications		1 Sep 86
DA Pam 672–3	Unit Citation and Campaign Participation Credit Register (Jan 60–Feb 86)		28 Oct 86
JFTR (V–I)	Joint Federal Travel Regulation		1 Jan 87
JFTR (V–I)	Joint Federal Travel Regulation	1	1 Jan 87
UPDATE 11	Morale, Welfare and Recreation		31 Oct 86

3. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Bialos & Juster, *The Libyan Sanctions: A Rational Response to State-Sponsored Terrorism?*, 26 Va. J. Int'l L. 799 (1986).

Campbell & McKelvey, *Partitioning Military Retirement Benefits: Mapping the Post-*McCarty *Jungle*, 49 Tex. B.J. 970 (1986).

Darby, *The Soviet Doctrine of the Closed Sea*, 23 San Diego L. Rev. 685 (1986).

Dobson, *Medical Malpractice in the Birthplace: Resolving the Physician-Patient Conflict Through Informed Consent, Standard of Care, and Assumption of Risk*, 65 Neb. L. Rev. 655 (1986).

Faltus, Sirota, Parsons, Daamen & Schare, *Exacerbations of Post-traumatic Stress Disorder Symptomatology in Vietnam Veterans*, 151 Mil. Med. 648 (1986).

The Future of Software Protection, 47 U. Pitt. L. Rev. 903 (1986). Goodman & Reed, *Age Differences in Eyewitness Testimony*, 10 Law & Hum. Behav. 317 (1986).

Graham, *Evidence and Trial Advocacy Workshop: Hearsay—A Reformulated Definition*, 22 Crim. L. Bull. 518 (1986).

Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. Ill. L. Rev. 43.

Herbold, *AIDS Policy Development Within the Department of Defense*, 151 Mil. Med. 623 (1986).

Imwinkelried, *Demeanor Impeachment: Law and Tactics*, 9 Am. J. Trial Advoc. 183 (1985).

Jacobs & Travis, *Compliance Strategies for Draft Registration*, 27 Ariz. L. Rev. 837 (1985).

Knowles & McCarthy, *Parents, Psychologists and Child Custody Disputes: Protecting the Privilege and the Children*, 37 Ala. L. Rev. 391 (1986).

Krajewski, *Change for the Sake of Change: An Analysis of the Final Regulations Governing Citizens or Residents of the United States Living Abroad*, 11 Rev. Tax'n Individuals 23 (1987).

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Linz, Penrod & McDonald, *Attorney Communication and Impression Making in the Courtroom: Views from Off the Bench*, 10 Law & Hum. Behav. 281 (1986).

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